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In The Supreme Court of the United States

CHERYL COHEN, on behalf of herself and others similarly situated,

Petitioner,

v.

OFFICE DEPOT, INC., a Florida Corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the decision of the Eleventh Circuit Court of Appeals in this case finding that punitive damages may not be aggregated in a class action to satisfy the amount in controversy required by 28 U.S.C. Section 1332, which is in conflict with the Fifth Circuit Court of Appeals' decision in Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995), is in conformity with this Court's holdings in Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053 (1969) and Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. (1973) regarding the nature of common and undivided interests for aggregating damages.

Whether the Eleventh Circuit's interpretation of the "matter in controversy" language of 28 U.S.C. Section 1332 exclusively from a single plaintiff's perspective properly construes a defendant's interest, whether corporate or individual, in obtaining the benefits of Federal jurisdiction, or whether defendant(s)' Constitutionally protected Equal Protection Guarantees have been violated.

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Petitioner, Cheryl Cohen ("Cohen"), on behalf of herself and others similarly situated, petitions for a writ of certiorari to the United States Supreme Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF JURISDICTION

The initial opinion of the Eleventh Circuit Court of Appeals determining the existence of jurisdiction under 28 U.S.C. Section 1332 (App. A, *infra*, 1a-16a) was issued on August 17, 1999 and is reported at 184 F. 3d 1292 (11th Cir. 1999). On a timely filing of a Petition for Rehearing and Rehearing En Banc by Respondent, Office Depot, Inc., the Eleventh Circuit Court of Appeals issued an opinion on February 24, 2000 (App. B, *infra*, 17a-46a) that affirmed the dismissal by the district court for lack of jurisdiction and vacated, in part, the initial opinion of the Court and is reported at 204 F.3d 1069 (11th Cir. 2000). The Order denying Petitioner's Petition for Rehearing and Rehearing En Banc (App. C, *infra*, 47a-48a) was issued on May 31, 2000. The Order granting Petitioner's Motion to Stay Issuance of Mandate pending the filing of this Petition for Writ of Certiorari (App. D, *infra*, 49a-50a) was issued on July 7, 2000.

The opinion of the District Court with respect to dismissal for lack of subject matter jurisdiction (App. E, *infra*, 51a-60a) was issued on April 3, 1998. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254 and Rule 10 of the Supreme Court Rules.

STATUTORY PROVISIONS INVOLVED

Title 28, U.S.C. Section 1332(a) is involved in this case, and provides, in relevant part, "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between -- (1) citizens of different states...."[1]

STATEMENT OF THE CASE

A. Factual Background

On November 12, 1997 Cohen, on behalf of herself and others similarly situated, filed a Class Action Complaint ("Complaint") against Respondent, Office Depot, Inc. ("Office Depot") in the Federal District Court for the Southern District of Florida. R1-1. [2] The Complaint alleged that Office Depot engaged in unfair, deceptive and fraudulent business and trade practices and sought relief under Florida common law and

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[1] The well-settled law of this Court is that in diversity cases brought in federal court under Section 1332, the amount in controversy is the sum claimed in plaintiff's complaint. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 58 S. Ct. 586 (1938).

[2] Record references refer to the record before the Eleventh Circuit Court of Appeals. The "R1," "R2" or "R3" cites refer to the volume number, document number and page number, if applicable, of the record below.

statutory theories and asserted that diversity jurisdiction existed under 28 U.S.C. Section 1332. R1-1-3.[3]

Specifically, Cohen asserted that in its mail order catalogs, Office Depot advertises that its prices are the lowest prices available in the market and that it provides free delivery of merchandise ordered from its catalogs. R1-1-3. As such, Office Depot's claims lead customers to believe that the prices for merchandise in the catalogs will be as low, if not lower, than the prices of identical merchandise purchased from any other office supply store, including Office Depot's own stores. R1-1-3. In fact, as Cohen's Complaint revealed, Office Depot's catalog prices often are significantly higher than the price of the same item in the Office Depot stores. R1-1-3. This information was withheld from customers. R1-1-5.

Cohen requested compensatory damages, statutory attorneys' fees, injunctive relief and punitive damages,[4] all of

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[3] The proposed class consisted of "All individuals and businesses who purchased merchandise from Office Depot's catalogs during the past four (4) years, when they could have purchased identical merchandise for a lower price at an Office Depot store." R1-1-7. Cohen estimated that the class would include over one thousand customers, in each of the 39 states in which Office Depot maintains stores, for a total of approximately 39,000 class members. R1-1-7.

[4] Cohen sought punitive damages under Florida law because the deceptive and fraudulent statements made by Office Depot for the purpose of inducing customers to purchase catalog merchandise was done wantonly, intentionally and maliciously. R1-1-10. In support of her request, Cohen asserted that when

which are properly considered in determining the amount in controversy to establish subject matter jurisdiction pursuant to 28 U.S.C. Section 1332. R1-1-2.[5]

In fact, in ruling on Office Depot's motion to dismiss for lack of subject matter jurisdiction, the District Court found that Cohen's claim for $10,000,000 in punitive damages for the class appeared to satisfy the amount in controversy requirement of Section 1332. (App. E, *infra*, 55a). However, the District Court struck Cohen's claim for punitive damages because it found that Section 768.72, Fla. Stat. was a substantive statute requiring a party in federal court to seek leave of Court prior to asserting a claim for punitive damages. On this basis, the District Court dismissed the Complaint for failure to satisfy the amount in controversy requirement of Section 1332.[6] (App.

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confronted by allegations that its statements constitute a deceptive trade practice, an Office Depot spokesman stated to the Miami Herald Newspaper, "It is certainly not uncommon that catalog pricing would be a little higher because of providing free delivery,"thereby admitting Office Depot's knowledge that its claim of "free delivery" is not only misleading, but false. R1-1-6.

[5] In Bell v. Preferred Life Assur. Soc. of Montgomery Ala, 320 U.S. 238, 64 So. Ct. 5 (1943), this Court held that where actual and punitive damages are recoverable under a complaint, each must be considered to the extent claimed in determining the jurisdictional amount.

[6] From the inception of this lawsuit, the parties have not disputed that there is diversity of citizenship between Cohen and Office Depot pursuant to Section 1332.

E., *infra*, 50a). Cohen appealed the District Court's dismissal of the Complaint. R3-60.

In its first opinion in this case, issued on August 17, 1999 ("Cohen I") the Eleventh Circuit Court of Appeals reversed the District Court's dismissal and held that Section 768.72, Fla. Stat. conflicts with and must yield to the "short and plain statement rule contained in Fed. R. Civ. P. 8(a)(3) and as such a Florida plaintiff in federal court because of diversity jurisdiction need not obtain leave of court before pleading a request for punitive damages." (App. A, *infra*, 1a-16a).

The Cohen I court also determined that in a class action lawsuit, punitive damages may be aggregated to satisfy the amount-in-controversy requirement pursuant to the authority of Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11th Cir. 1996). (App. A, *infra*, 5a). Thus, the court found that the amount in controversy requirement was satisfied by the request for $10,000,000 in punitive damages for the class of approximately 39,000. (App. A, *infra*, 15a-16a).

Subsequent to the August 17, 1999 opinion, Office Depot filed a Petition for Panel Rehearing. Office Depot argued that the Cohen I holding regarding Section 768.72, Fla. Stat. was incorrect and also contended, belatedly, that Cohen I erred in relying on the Tapscott decision to allow for aggregating punitive damages because of a conflict with Lindsey v. Alabama Telephone Co., 576 F.2d 593 (5th Cir. 1978), which it maintained did not allow aggregation.[7]

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[7] In 1981, the Fifth Circuit Court of appeals "split" and the Eleventh Circuit was created. Accordingly, cases decided by

After supplemental briefing on the purported conflict between Lindsey and Tapscott, the court issued a second opinion on February 24, 2000 ("Cohen II") in which it upheld Cohen I on the issue that Section 768.72, Fla. Stat. is not applicable for pleading claims for punitive damages in federal court. (App. B, *infra*, 17a-46a). However, Cohen II vacated Cohen I with respect to the holding that the amount in controversy was satisfied by aggregating the $10,000,000 punitive damage request. (App. B, *infra*, 18a).

The Cohen II panel determined that: 1) there was a conflict between Lindsey and Tapscott; and 2) it was bound to follow Lindsey as precedent in the Eleventh Circuit. The Cohen II court affirmed the District Court's dismissal of Cohen's Complaint and disallowed aggregation of punitive damages in this case. (App. B, *infra* 17a-30a). On this issue, the Cohen II Court tacitly acknowledged a conflict with the Fifth Circuit Court of Appeals by citing to Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir 1995).[8] (App. B, *infra*, 26a).

Thereafter, on March 16, 2000 Cohen filed a Petition for Rehearing and Rehearing En Banc ("Petition for Rehearing"). Cohen argued that Cohen II improperly relied on

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the Fifth Circuit prior to 1981, are binding on the current Fifth Circuit Court of Appeals, as well as the Eleventh Circuit Court of Appeals. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).

[8] The Cohen II panel also found that neither Cohen's request for attorneys' fees nor the value of injunctive relief sought by Cohen satisfied the amount in controversy requirement. (App. B, *infra*, 30a-46a).

Lindsey instead of Tapscott as precedent for determining a common and undivided interest for aggregating punitive damages because Lindsey failed to consider Supreme Court law on the issue, as set forth in Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053 (1969) and Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. 505 (1973).

Moreover, Cohen's Petition for Rehearing pointed out that the Fifth Circuit Court of Appeals in Allen v. R & H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995) held that the collective nature of punitive damages under Mississippi law allowed for aggregation to satisfy the amount in controversy. Allen was decided subsequent to Lindsey and Allen cited Lindsey, but noted that "[the issue whether punitive damages ... represent a common and undivided interest] is a [question] of first impression ... in this circuit." Allen, 63 F.3d 1332.[9]

Cohen's Petition for Rehearing was denied on May 31, 2000. (App. C, *infra*, 47a-48a). On June 14, 2000, Cohen filed a Motion to Stay Issuance of the Mandate based on the

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[9] The Eleventh Circuit granted permission and on March 23, 2000 a Brief of *Amicus Curiae* Gold Kist, Inc., GTE South, Inc., GTE Wireless, Inc., Mohawk Industries, Inc., National Association of Independent Insurers and Safeco Insurance Company of America was filed with the Eleventh Circuit in support of Cohen's Petition for Rehearing. The Amicus Brief raised arguments that a claim for punitive damages represents a common and undivided interest and that in interpreting the "matter in controversy" language of Section 1332 by disregarding a defendant's interests in a case, the Cohen II panel's decision violated Constitutional equal protection guarantees.

conflicting opinions between the Fifth and Eleventh Circuit Courts of Appeals regarding the matter of aggregation of punitive damages in deciding the amount in controversy under 28 U.S.C. Section 1332. Cohen argued that not only did the Cohen II's decision to follow Lindsey result in a reversal of the law of the circuit since 1996, established by Tapscott, but it is in conflict with the Fifth Circuit Court of Appeals decision in Allen, which held that aggregation of punitive damages is permitted, to satisfy jurisdictional amounts, where plaintiffs unite to enforce a single title or right in which they have a common and undivided interest. Cohen maintained that this conflict was a proper bases for this Court to consider granting certiorari in this case.

Cohen also pointed out in her Motion to Stay Issuance of the Mandate that an additional basis for the granting of a petition for writ of certiorari is that Lindsey relied on Zahn in determining that the claims of several plaintiffs cannot be aggregated for purposes of satisfying jurisdictional requirements and that each member of a class was required to satisfy the amount in controversy requirement. This holding is in conflict with the Fifth Circuit Court of Appeals decision in Free v. Abbott Laboratories, Inc., 51 F. 3d 524 (5th Cir. 1995), aff'd, 120 S. Ct. 1578 (U.S. April 3, 2000), in which the Court held that 28 U.S.C. Section 1367, which provides for supplemental jurisdiction of federal courts, overruled the holding in Zahn which required that each member of a class action satisfy the amount in controversy requirement of 28 U.S.C. 1332. The Free Court noted that if a class representative satisfies the amount in controversy a district court can exercise supplemental jurisdiction over members of a class although they do not meet the amount-in-controversy

requirement. Free, 51 F.3d at 529. Cohen maintained that this Court's per curiam affirmance of the Free decision left an important question of federal law unresolved.

On July 7, 2000 the Eleventh Circuit Court of Appeals granted Cohen's request to stay issuance of the mandate through August 15, 2000, pending the filing of the instant Petition for Writ of Certiorari. (App. D, *infra*, 49a-50a).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Conflict Between the Circuit Courts of Appeals On the Issue of Aggregation of Punitive Damages Compels the Granting of the Petition Sought Herein

As one court recently acknowledged, "The problem [in determining to allow aggregation of punitive damages] is confusion among the circuits, within the circuits, and, consequently, across the board with all districts." See ABS Insurance Ltd. v. Nat'l Union Fire Insurance Co., 51 F. Supp. 2d 762 (E.D. Tex. 1999).

Prior to setting forth a discussion regarding the conflict in the Circuit Court decisions, it is important to note that this Court has not resolved the issue whether punitive damages may be aggregated to satisfy the amount in controversy requirement of Section 1332, but this Court has established long-standing law on the issue of when plaintiffs may claim a common and undivided interest in a matter to establish the amount in controversy under Section 1332.

1. This Court's Pronouncement Regarding Common and Undivided Interests

The starting point for analyzing the issue of aggregation of damages is this Court's determination regarding when claims may be considered to be common and undivided. As early as 1967, the former Fifth Circuit acknowledged the vitality of the Supreme Court's holdings regarding the aggregation of common and undivided interests by plaintiffs, as an exception to satisfying individual jurisdictional amount in controversy requirements under 28 U.S.C. Section 1332. In Alvarez v. Pan American Life Ins. Co., 375 F.2d 992, 993 (5th Cir. 1967) the Court noted the distinction between separate and distinct claims, which are not aggregable, and instances where several plaintiffs unite to "[e]nforce a right or title which they hold in common," which may be aggregated for jurisdictional purposes.

In this Court's seminal case on the issue of aggregation of damages, Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053 (1969),[10] this Court addressed the question of whether the

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[10] The "exception" to the rule of non-aggregation dates at least to 1891 when this Court described the exception as follows:

> The general principle observed in all [cited cases] is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction ...

claims of the plaintiffs in a class could, merely by virtue of the plaintiffs' class status, be aggregated to satisfy the amount in controversy requirement. The Supreme Court held that they could not in the matter before it, but reiterated its long-standing and well-settled law that aggregation was permissible in cases where "[t]wo or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." Id. at 335.

Similarly, in Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. 505 (1973) the Court reiterated the principle that "[w]hen several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." Id. at 294.

2. Lindsey Failed to Consider this Court's Holdings in Snyder and Zahn

Within this existing legal framework, in Lindsey, the plaintiffs brought a class action under Alabama law against two telephone companies. While the plaintiffs each claimed $2,000 in compensatory damages, the class sought $1,000,000 in punitive damages. The Lindsey Court noted that "[s]ignificantly, the complaint nowhere alleges the number of persons in the class, an allegation that would have permitted the court to ascertain what dollar amount represents the 'amount in controversy' for each member of the class." Id. at 595. On this

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Clay v. Field, 138 U.S. 464, 11 S. Ct. 419 (1891) (citations omitted).

basis and without analysis, the Lindsey Court remarked that the "claims of several plaintiffs, suing as members of a class, cannot be aggregated." Lindsey, 576 F.2d at 594, citing, Snyder, 394 U.S. 332; Zahn, 414 U.S. 291.

Notably, the Lindsey Court did not address the holdings or analysis of Alvarez, Snyder or Zahn that aggregation is permissible to meet the amount in controversy requirement where "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." Snyder, 394 U.S. at 335. In fact, although the plaintiff class in Lindsey did request exemplary damages for their common law tort claims under Alabama law, the Fifth Circuit was not presented with the issue of whether the punitive damages sought were a common and undivided interest of the class for the purpose of aggregation.

3. In Allen and Tapscott the Fifth and Eleventh Circuits Analyzed the Issue of Aggregation of Punitive Damages Based on this Court's Decisions in Snyder and Zahn

Subsequently, and of consequence in this petition, the Fifth Circuit decided Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995). In Allen, 512 plaintiffs brought tort claims in a Mississippi state court for damages resulting from an explosion and release of toxic fumes and sought both compensatory and punitive damages, but did not allege a specific amount. After removal by the corporate defendants and in determining diversity jurisdiction, the Fifth Circuit noted that where "[t]wo or more plaintiffs unite to enforce a single

title or right in which they have a common and undivided interest," then, aggregation was allowed. 63 F.3d at 1300. The Allen court also acknowledged that no clear standards existed to determine when to apply this standard, but that "recognized guidelines ... that have evolved" suggest that when plaintiffs' rights are "integrated" and arise from the same legal source, then they could be considered common and undivided. Id. at 1330.

The Allen Court held that Mississippi state law required a district court to aggregate a group of plaintiff's Mississippi punitive damage claims when making the jurisdictional determination. The Court analyzed punitive damages under the state law before it and determined that they were "fundamentally collective," not compensatory and were intended to punish a tortfeasor and to deter him from similar conduct. Id. at 1335. The Court held

> As punitive damages are collective awards, each plaintiff has an integrated right to the full amount of an award. An award's ultimate distribution does not change this result. Punitive damages are, to use the language of the caselaw, undivided claims of right with a potentially separable award. Here, each of the 512 plaintiffs was empowered to bring a claim for punitive damages separately. The fact that they choose not to pursue their claims individually does not limit each plaintiff's alleged entitlement to the award; it only affects its distribution. The limiting factor

> here was the plaintiffs' decision to file jointly.

Id. at 1333.

Allen is a Fifth Circuit opinion decided subsequent to Lindsey, and although the Allen Court was bound by any Fifth Circuit opinions regarding aggregation, including Lindsey, the Court cited to Lindsey and noted that "[the issue whether joint claims for punitive damages under Mississippi law represent a common and undivided interest] is a [question] of first impression on the appellate level in this circuit." Allen, 63 F.3d at 1332.[11]

One year later, the Eleventh Circuit decided Tapscott, 77 F.3d 1353 (11th Cir. 1996). In Tapscott, the Eleventh Circuit held that in determining the total amount in controversy for the purpose of federal jurisdiction, a class action claim for

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[11] Another Fifth Circuit decision decided after Allen, Ard v. Transcontinental Gas Pipe Line Corp., 138 F.3d 596 (5th Cir. 1998) held that punitive damages were not aggregable. However, a clear reading of the Ard opinion reveals that the Court discussed the various opinions regarding aggregation of punitive damages, including Tapscott and Allen, and determined that in Tapscott and Allen, the nature of punitive damages under state law resulted in a finding that aggregation of punitive damages would be allowed. The Ard Court did not disagree with Allen or Tapscott, but, instead, analyzed the aggregation issue by looking at Louisiana law and found aggregation was not appropriate. 138 F.3d at 601. Therefore, although the Ard Court reached a different result, the Ard opinion is consistent with Allen.

punitive damages should be considered in the aggregate, without proration to each class member. Id.

As in Allen, the Tapscott corporate defendant removed a state court class action, which involved violations of Alabama law arising from the sale of service contracts on automobiles. In opposing the removal, plaintiffs sought to limit their individual damages and those of any other class members to an amount not more than $49,000, which included statutory, compensatory and punitive damages, and injunctive relief. 77 F.3d at 1355.

In making a determination regarding whether the amount in controversy was satisfied, the Tapscott Court noted that if the punitive damages in the putative class action could be considered in the aggregate, then the $50,000 requirement was satisfied. Id. at 1357. The court decided that whether punitive damages are aggregable "cannot be determined on the distinction of whether they arise from multiple individual transactions or from a single act or mass tort." Id. at 1358, n.11. Instead, the Tapscott Court held, as did Allen, that the inquiry must focus on the nature of punitive damages under the state law at issue, i.e., Alabama. Id. The Court determined that the purpose of punitive damages in Alabama "is to deter wrongful conduct and punish those responsible ... An injured party is not entitled to punitive damages as a matter of right ... Rather, the state and not the victim is considered the true party plaintiff because punitive damages do not compensate a victim for loss but serve to punish and deter." Id. (citations omitted).

Notably, the Tapscott Court also cited to Lindsey, but proceeded to analyze the issue before it as one unsettled in the

Eleventh Circuit. 77 F.3d at 1357. In fact, both the Tapscott and Allen Courts, which cited to Lindsey, and which would have been bound by Lindsey, properly concluded that the issues presented to them for resolution were questions of first impression in the Fifth and Eleventh Circuits.

Clearly, as the discussion set forth above shows, Lindsey did not consider or address whether punitive damages are common and undivided interests, the very issues presented in Allen and Tapscott. Therefore, it was proper for the Allen and Tapscott Courts to recognize Lindsey for a general rule regarding non-aggregation under Snyder, and then to proceed to analyze and resolve the issue of whether punitive damages are properly aggregated as a common and undivided interest under the state law at issue.

4. The Eleventh Circuit's Judgment in Cohen II Created a Conflict with the Allen Opinion on an Important Issue of Federal Law That is Unresolved and Must Be Settled by This Court

The Eleventh Circuit in Cohen II asserted that Lindsey's holding regarding non-aggregation of punitive damages should stand as the law of the Circuit.[12] Such a determination created

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[12] Notably, the Cohen II Court held that punitive damages under Florida law were indistinguishable from those under Alabama law as they were designed to serve the collective good, and are warranted only "[w]here the egregious wrongdoing of the defendant ... constitutes a public wrong." (App. B., *infra*, 26a).

a conflict with the Fifth Circuit's pronouncement in Allen and is flawed, since Lindsey clearly failed to apply the then existing Supreme Court law regarding common and undivided interests, under Snyder and Zahn. Certainly, Lindsey's citation to Snyder and Zahn as to the general proposition of non-aggregation, did not address or determine the state of the law at the time of the decision, something the Cohen II panel clearly overlooked in determining that Lindsey was the law of the circuit.

Had Lindsey expressly and specifically considered the well-settled exception regarding aggregation found in Snyder and Zahn, then the Cohen II panel's interpretation and application of Lindsey and Tapscott would make sense.

Rather, the Cohen II decision resulted in the undeniable and inequitable fact that class action litigants who present claims in the Fifth Circuit based on diversity jurisdiction will be entitled to a review of the aggregability of punitive damages sought under the state law at issue -- under Allen -- while class action litigants who present claims in the Eleventh Circuit will never be entitled to such review by the district courts.

In addition, numerous cases are before the federal courts in the Eleventh Circuit, at all stages of the proceedings, based upon the Tapscott decision, which cases will be prejudiced greatly by the loss of subject matter jurisdiction by the federal courts.

To effectuate a resolution of such a conflict and to resolve an important question of federal law that is unsettled are the very reasons this Court grants certiorari review. As this

Court stated in Braxton v. United States, 500 U.S. 344, 111 S. Ct. 1854 (1990)

> A principle purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law ...

Id., 500 U.S. at 347, 111 S.Ct. 1857. See, FTC v. Flotill Products, Inc., 389 U.S. 179, 88 S. Ct. 401 (1967) (Court held that conflicts with decisions of other courts of appeals compelled the granting of certiorari for a review of such decisions); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 81 S. Ct. 1579 (1961) (Court granted certiorari to resolve the conflict between the decisions of the First and Seventh Circuits). See also, First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S. Ct. 1575 (1968) (Certiorari granted to determine whether decisions of federal courts were in conformity with prior Supreme Court decision relating to availability of summary judgment in antitrust litigation).

There can be no clearer example of the need for this Court to grant certiorari to review and determine an important issue of law over which the Courts of Appeals are in conflict and which is unsettled.

Further, it is clear that based on the Snyder and Zahn decisions and the law regarding common and undivided interests, which this Court has not specifically resolved as to

punitive damages, the Allen and Tapscott Courts' determination to look to state law as the basis for concluding whether to aggregate punitive damages to satisfy the amount in controversy requirement of 28 U.S.C. Section 1332 is sound and correct.

Importantly, it is undeniable that in the context of a class action, punitive damages are awarded as a single, undifferentiated sum based on common conduct that affects an entire class, rather than discrete and differentiated conduct that varies based on each member's particular circumstances. In fact, this Court has recognized that "under the law of most states, punitive damages are imposed for purposes of retribution and deterrence." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19, 111 S. Ct. (1991). Thus, it is "a well-established principle of the common law that in [tort] actions ... a jury may inflict ... exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff." 499 U.S. at 16, 111 S. Ct. at 1042.

These general principles are precisely the bases for the Allen and Tapscott decisions and make it clear that a claim for punitive damages, particularly from a class action perspective, represents a claim for a common and undivided interest in a single sum.

In addition, Fed.R.Civ.P. 23 imposes proof requirements to ensure that the claims and defenses of the class are common to a group of similarly situated people. Likewise, a class claim for punitive damages is dependent on common proof of a defendant(s) actions. Thus, considerations under

Rule 23 also result in a determination that Cohen II is wrongly decided as the law on the issue of aggregation of punitive damages under Section 1332.

5. An Additional Bases for Granting Certiorari is the Uncertainty Regarding the Viability of this Court's Holding in Zahn

Moreover, an additional basis for granting the petition for writ of certiorari in this matter is that Lindsey v. Alabama Telephone Company, 576 F.2d 593 (5th Circuit 1978) cited to Zahn in determining that the claims of several plaintiffs cannot be aggregated for purposes of satisfying jurisdictional requirements and that each member of a class was required to satisfy the amount in controversy requirement.

This holding in Lindsey, and affirmance by Cohen II is in conflict with the Fifth Circuit Court of Appeals decision in Free v. Abbott Laboratories, Inc., 51 F. 3d 524 (5th Cir. 1995), aff'd, 120 S. Ct. 1578 (U.S. April 3, 2000), in which the Court held that 28 U.S.C. Section 1367, which provides for supplemental jurisdiction by federal courts, overruled the holding in Zahn. Specifically, the Free Court determined that Zahn was overruled with respect to the requirement that each member of a class action satisfy the amount in controversy requirement of 28 U.S.C. 1332.

The Free Court noted that if a class representative satisfies the amount in controversy, a district court can exercise supplemental jurisdiction over members of a class although they did not meet the amount-in-controversy requirement.

In Free, this Court granted certiorari on the specific question whether the supplemental jurisdiction statute overruled Zahn and expands federal jurisdiction in a class action to encompass class members whose claims do not satisfy the amount in controversy requirement of Section 1332. The grant of certiorari and this Court's per curiam affirmance of the Free Court's holding clearly affects the viability of the Lindsey opinion, to the extent that Lindsey cited to Zahn on the issue of non-aggregation. Thus, further conflict, uncertainty and confusion exists regarding the Circuit Courts' determination of federal diversity jurisdiction.

B. An Interpretation of the "Matter in Controversy" Language of Section 1332 that Disregards a Defendant's Interest in the Case Violates Equal Protection Guarantees

An additional important federal question determined by Cohen II and Lindsey, which this Court has not settled, is that the "matter in controversy" language in Section 1332 should be interpreted exclusively from a single plaintiff's perspective. Such a determination is fundamentally inconsistent with the purpose of the statute, especially in the context of modern class action litigation. Also, such an interpretation deprives a foreign defendant of the statutorily created right of access to a federal court when faced with very large monetary judgments. Thus, not only is the statute, as interpreted and applied in this manner, not rationally related to a legislative aim, but undermines the very purpose of Section 1332.

As an initial matter, when Congress enacted Section 1332(a) it did not expressly define the phrase "matter in

controversy." This Court has held that "the amount in controversy is measured by the value of the object of the litigation." Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 346, 97 S. Ct. 2434 (1997). Notably, this Court never has ruled that the value must be determined exclusively from a plaintiff's perspective. Nevertheless, the Lindsey and Cohen II opinions have determined that the phrase "matter in controversy" must be interpreted exclusively from the perspective of a single plaintiff.

Congress enacted Section 1332 "to provide a separate forum for out-of-State citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts." Jerguson v. Blue Dot Invest., Inc., 659 F.2d 31, 35 (5th Cir. 1981).[13] Despite such Congressional intent, a "single plaintiff's perspective" interpretation of the statute results in manipulative and gerrymandered pleadings designed to strip defendants of the federal court access the statute was designed to provide. See, e.g., Saunders v. Wire Rope Corp., 777 F. Supp. 1281, 1284 (E.D. Va. 1991). Such an interpretation also is irrational because it undermines Congress' objective of providing out-of-

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[13] The protections of Section 1332 apply with even greater force in class action litigation. As the Third Circuit noted, "[f]rom a policy standpoint, it can be argued that national (interstate) class actions are the paradigm for federal diversity jurisdiction because, in a constitutional sense, they implicate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises. Kress v. Prudential Ins. Co. (In re Prudential Ins. Co. of America Sales Practices Litigation), 148 F.3d 283, 305 (3d Cir. 1998).

state citizens with access to the federal courts when the matter in controversy exceeds $75,000.

As a general rule, laws must treat similarly situated persons equally unless the statute at issue is rationally related to a legitimate state interest. Reed v. Reed, 404 U.S. 71, 75, 92 S. Ct. 251 (1971). Indeed, although the federal courts are courts of limited jurisdiction, once Congress provides access, "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Harper v. Virginia State Bd. Of Elec., 383 U.S. 663, 665, 86 S. Ct. 1079 (1966).

To the extent that Lindsey, Cohen II and other such decisions interpret Section 1332 exclusively from a single plaintiff's perspective, they treat similarly situated citizens unequally, and in a way that is contrary to the state interest embodied in Section 1332.

Based on this Court's equal protection precedents, a court "must consider the facts and circumstances behind the law, the interests which the [legislature] claims to be protecting, and the interests of those who are disadvantaged by the classification." Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 725, 93 S. Ct. 1224 (1973) (citation omitted). Even under the lower standard imposed by the rational relationship test, Section 1332 cannot be constitutionally construed from a single plaintiff's perspective only.

Accordingly, in light of the stated purpose of the diversity jurisdiction statute and the amount in controversy

requirement, any application of Section 1332, that discriminates against out of state defendants by preventing access to a federal forum violates the equal protection guarantees of the Constitution.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 19, 1999

[PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4787
D.C. Docket No. 97-3 611 -Civ-JAL

CHERYL COHEN, on behalf of herself and others similarly situated,

Plaintiff-Appellant,

versus

OFFICE DEPOT, INC., a Florida corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(August 17, 1999)

Before BIRCH and CARNES, Circuit Judges, and MILLS*, Senior District Judge.

CARNES, Circuit Judge:

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*Honorable Richard Mills, Senior U.S. District Judge for the Central District of Illinois, sitting by designation.

Cheryl Cohen appeals the district court's dismissal of her Florida state law deceptive advertising suit against Office Depot. The district court struck Cohen's prayer for punitive damages from her complaint for failure to comply with a Florida statute requiring a plaintiff to obtain leave of court before requesting punitive damages. Finding that the other relief Cohen requested did not satisfy the amount-in-controversy requirement for diversity jurisdiction, the court dismissed her suit on jurisdictional grounds. For the reasons set forth below, we reverse.

I. BACKGROUND

A. FACTS

Cohen's complaint alleges that Office Depot made representations and statements in its catalogues which led "customers to believe that Office Depot's prices for merchandise in its catalog will be as low, if not lower, than the prices of identical merchandise purchased from any other office supply store, including Office Depot's own stores[,]" when "[i]n fact, Office Depot's catalog prices are often significantly higher than the price of the same item in the Office Depot stores." The complaint also alleges that Cohen relied upon such advertisements in the Fall 1997 catalogue when she purchased by phone a color cartridge for $26.99 and file folder labels for $1.99. When those items were subsequently delivered, the accompanying invoice reflected no delivery charges in the price of the items. A few days later, Cohen went into an Office Depot store and saw the same cartridge priced at $2.00 less, and the same labels priced at $0.30 less, than their prices in the catalogue. An Office Depot spokesman allegedly admitted to

a newspaper that the claim of free delivery was false when the spokesman explained the difference between the store and catalogue prices by saying, "It is certainly not uncommon that catalog pricing would be a little higher because of providing free delivery."

B. PROCEDURAL HISTORY

On November 12, 1997, Cohen filed a complaint in federal district court on behalf of herself and a proposed nationwide class of approximately 39,000 Office Depot customers, alleging that Office Depot had made deceptive statements regarding the pricing of its merchandise in violation of the Florida laws governing unfair and deceptive trade practices, fraud, and misleading and negligent advertising. In addition to compensatory damages, the complaint sought $10,000,000.00 in punitive damages, an injunction prohibiting deceptive advertising in the future, attorney fees, and costs. Because no violation of federal law was alleged, subject matter jurisdiction was founded solely upon diversity of citizenship under 28 U.S.C. § 1332.

Office Depot moved to strike the punitive damages request from the complaint and dismiss the lawsuit. The court granted the motion to strike the punitive damages request on, the ground that Cohen had failed to comply with Florida Statutes § 768.72, which requires a plaintiff to obtain leave from the court before including a prayer for punitive damages in a pleading. The court then determined that the other relief requested by Cohen failed to meet the $75,000 amount-in-controversy requirement for diversity jurisdiction.

Accordingly, the court granted Office Depot's motion to dismiss Cohen's suit for lack of subject matter jurisdiction.[1]

II. DISCUSSION

The issue on appeal is whether the district court erred in concluding that Cohen had not met the $75,000 amount-in-controversy requirement for diversity jurisdiction. For diversity cases originally brought in federal court, the amount in controversy is simply the sum claimed in the plaintiff's complaint, "if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89, 58 S. Ct. 586, 590 (1938).

Cohen argues that her requests for punitive damages, attorney fees, and injunctive relief, taken individually or together, satisfy the amount-in-controversy requirement and establish diversity jurisdiction. Because we conclude that her request for punitive damages alone is sufficient for jurisdictional purposes, we need not consider whether the other relief she requests would suffice.

The Supreme Court has held that "[w]here both actual and punitive damages are recoverable under a complaint[,] each must be considered to the extent claimed in determining jurisdictional amount." Bell v. Preferred Life Assur. Soc. of Montgomery, Alabama, 320 U.S. 238, 240, 64 S. Ct. 5, 6

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[1] The court subsequently clarified that the dismissal was without prejudice.

(1943). Here, Cohen requests $10,000,000 in punitive damages, which is obviously greater than the amount-in-controversy threshold of $75,000. It is undisputed that under state law Cohen would be entitled to an unspecified amount of punitive damages on two of her claims if she is successful.

Under our holding in Tapscott v. MS Dealer Service Corporation, 77 F.3d 1353, 1358-59 (11th Cir. 1996), in a class action lawsuit punitive damages may be aggregated to satisfy the amount-in-controversy requirement for each class member. To be sure, Tapscott involved Alabama law, not Florida law, and it did not establish a broad rule that all punitive damages claims may be aggregated for purposes of determining the amount in controversy. Tapscott did hold, however, that punitive damages may be aggregated where state law provides that an award of punitive damages is for the "public benefit" or "collective good," and the award would reflect "the wrongfulness of the defendant's course of conduct as a whole."Tapscott, 77 F.3d at 1358.

Those conditions are met in this case. Because Florida law, like Alabama law, provides that "punitive damages are warranted only where the egregious wrongdoing of the defendant ... constitutes a public wrong," Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986), awarding punitive damages is for the public benefit or collective good. Likewise, as in Tapscott, 77 F.3d at 1358-59, the award of punitive damages will reflect not the wrong done to any single individual but the wrongfulness of the conduct as a whole.

Accordingly, under Tapscott, punitive damages, in this Florida diversity case may be aggregated to satisfy the amount-

in-controversy requirement for each class member. But that can occur only if Cohen is permitted to assert her request for punitive damages. The district court struck Cohen's prayer for punitive damages, because she failed to comply with the conditions for seeking punitive damages set forth in Florida Statutes § 768.72. Section 768.72 provides as follows:

> In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

Cohen argues that she satisfied the requirements of § 768.72 because she proffered evidence of malice and wanton and reckless conduct sufficient to establish a reasonable basis for her punitive damages claim. However, the Florida Supreme Court has interpreted § 768.72 as requiring the dismissal of any request for punitive damages asserted without leave of the court. See Simeon, Inc. v. Cox, 671 So. 2d 158, 160 (Fla. 1996) (concluding "[i]t was inconsequential that the trial court

... held a hearing" to determine whether there was an evidentiary basis for a punitive damages claim stated in the initial complaint, because under the statute "any punitive damages claim alleged prior to a party asking for and receiving leave of the court must be dismissed or stricken."). See also WFTV, Inc. v. Hinn, 705 So. 2d 1010, 1011 (Fla. 5th Dist. Ct. App., 1998); Mayer v. Frank, 659 So. 2d 1254, 1255 (Fla. 4th Dist. Ct. App. 1995).

Thus, if § 768.72 applies in this case, the district court correctly struck the request for punitive damages from Cohen's complaint, which means that request could not provide a basis for federal diversity jurisdiction. If, on the other hand, § 768.72 does not apply, then the request for punitive d ages should not have been struck, and would provide a sufficient basis to satisfy the amount-in-controversy requirement for diversity jurisdiction. Accordingly, we must determine whether the pleading requirements of § 768.72 apply here, which entails resolving whether they conflict with any Federal Rule of Civil Procedure.[2]

Federal courts sitting in diversity are required to apply state substantive law and federal procedural law. See Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938); Lundgren v. McDaniel, 814 F.2d 600, 605 (11th Cir. 1987). The distinction between substance and procedure is often elusive, however, and the Supreme Court struggled for years to delineate it. In Guaranty Trust Co. of New York v. York, 326

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[2] We recognize that § 768.72 contains a discovery component as well as a pleading component, however, its discovery provision is not at issue in this case.

U.S. 99, 109, 65 S. Ct. 1464, 1470 (1945), the Court adopted an "outcome-determinative" test, meaning that the question of whether to apply state or federal law in diversity cases should be resolved so that "the outcome of the litigation in federal court [would] be substantially the same ... as it would be if tried in a State court." Realizing that even purely procedural laws could be outcome-determinative, the Court retreated from the York test 13 years later in Byrd v. Blue Ridge Rural Electric Coop., 356 U.S. 525, 78 S. Ct. 893 (1958). That decision held that in order to decide which rule should apply, courts must balance the federal interest in uniform process against the state interest in uniformity of results. See 356 U.S. at 536-40, 78 S. Ct. at 900-02.

Seven years later, in Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136 (1965), the Court developed a two-part test for deciding when state law should apply in federal diversity cases. Under the Hanna test, a court must determine whether the state law in question directly conflicts with a Federal Rule of Civil Procedure. If it does, "the court [is] instructed to apply the Federal rule, and can refuse to do so only if the Advisory Committee, [the Supreme] Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the [Rules] Enabling Act nor constitutional restrictions." Hanna, 380 U.S. at 47 1, 85 S. Ct. at 1144.

In addressing the applicability of § 768.72, at least one district court asked if it is substantive or procedural, and in answering that question looked to state law decisions characterizing the provision as substantive for some other purpose (such as the division of authority between the state legislature and judiciary). See Teel v. United Techs. Pratt &

Whitney, 953 F. Supp. 1534,1540 (S.D. Fla. 1997). That approach jumbles up the questions. Under Hanna, the proper question to ask is not whether the state law provision is procedural or substantive; instead, the court must ask whether the state law provision conflicts with a federal procedural rule. If it does, the federal procedural rule applies and the state provision does not. Stated another way, if the state law conflicts with a federal procedural rule, then the state law is procedural for Erie/Hanna purposes regardless of how it may be characterized for other purposes.

The only exception is where the advisory committee, the Supreme Court, and Congress have collectively erred and adopted a federal procedural rule that is either unconstitutional or should not have been adopted under the Rules Enabling Act process because it is a matter of substantive law. That exception will be exceedingly rare, and it does not apply here because, as we shall see, § 768.72 conflicts with Federal Rule of Civil Procedure 8(a)(3), which is a procedural rule and is not unconstitutional. To reiterate the important point that is sometimes overlooked: where state law conflicts with a federal rule of procedure, the substance versus procedure question is asked only about the federal rule, not about the state law provision. That is the first prong of the Hanna test.

The second prong of the Hanna test comes into play only if the state law does not conflict with a Federal Rule; if that is the case, then the court must determine whether failure to apply the state law would lead to different outcomes in state and federal court and result in inequitable administration of the laws or forum shopping. See Hanna, 380 U.S. at 468, 85 S. Ct. at 1142. But those determinations are not reached where the

first prong of Hanna applies, i.e., where the state provision conflicts with a federal rule of procedure.

Applying the Hanna test, federal district courts in Florida have reached different conclusions about whether § 768.72 applies in diversity cases. Most of the courts to address the matter agree that § 768.72 implicates Federal Rules of Civil Procedure 8(a) and 9(g), but they have split almost evenly on whether the statute actually conflicts with either or both of those rules. See, e.g., Alexander v. University/Gainesville Healthcare Ctr., Inc., 17 F. Supp.2d 1291, 1292 (N.D. Fla. 1998) (conflicts with Rule 8(a)); Tutor Time Child Care Sys., Inc. v. Franks Inv. Group, Inc., 966 F. Supp. 1188, 1190 (S.D. Fla. 1997) (conflicts with both Rule 8(a) and Rule 9(g)); Teel, 953 F. Supp. at 1538-41 (no conflict); Sanders v. Mayor's Jewelers, Inc., 942 F. Supp. 571, 575 (S.D. Fla. 1996) (no conflict); Al-Site Corp. v. VSI Int'l, Inc., 842 F. Supp. 507, 512 (S.D. Fla. 1993) (no conflict); State of Wisconsin Inv. Bd. v. Plantation Square Assocs., Ltd., 761 F. Supp. 1569, 1573-80 (S.D. Fla. 1991) (conflicts with Rule 8(a)); Citron v. Armstrong World Indus., Inc., 721 F. Supp. 1259, 1261-62 (S.D. Fla. 1989) (conflicts with Rule 9(g)).

Cohen argues that § 768.72 conflicts with Federal Rule of Civil Procedure 8(a)(2) and (a)(3). Rule 8(a) states, "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks."

Rule 8(a)(2)'s "short and plain statement" rule abandons traditional pleading formalities, requiring only that the pleading "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103 (1957). Cohen argues that § 768.72 essentially requires heightened pleading for punitive damages claims, contrary to the short and plain statement rule of 8(a)(2). It is clear, however, that a request for punitive damages is not a "claim" within the meaning of 8(a)(2); it is only part of the relief prayed for in a claim. Thus, there is no conflict between § 768.72 and Rule 8(a)(2).

As one district court has pointed out, "the more relevant portion of Rule 8 appears to be subsection (a)(3)." Teel, 953 F. Supp. at 1538. We have explained that under Rule 8(a)(3), any pleading that sets forth a claim must include a "concise statement identifying the remedies and the parties against whom relief is sought. . . . '" Goldsmith v. City of Atmore, 996 F.2d 115 5, 1161 (11th Cir. 1993) (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1255, at 366 (2d ed. 1990)). Punitive damages are a remedy, so under the rule a request for them should be included in the complaint. As we noted above, however, § 768.72 prohibits the inclusion of a request for punitive damages in any pleading without leave of court. Thus, it appears that § 768.72 does conflict with Rule 8(a)(3).

Office Depot contends that there is no real conflict between § 768.72 and Rule 8(a)(3) because Federal Rule of Civil Procedure 54(c) essentially renders Rule 8(a)(3) a nullity. It is true that Rule 54(c) tempers the effect of Rule 8(a)(3) somewhat by stating that, except in the case of default

judgments, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." But we do not view that language of Rule 54(c) as eviscerating Rule 8(a)(3)'s express and unambiguous direction that the plaintiff include a demand for relief in her pleadings. "The demand in fact may be helpful in indicating the relief to which plaintiff is entitled.... In addition, relief that the parties do not desire should not be forced on them." 10 Wright, Miller, & Kane, Federal Practice & Procedure § 2662, at 158-60 (3d ed. 1998). Furthermore, the portion of Rule 54(c) relating to default judgments provides that where the party against whom the claim is brought fails to defend against the claim, the relief awarded in a default judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." Thus, that part of Rule 54 actually reinforces Rule 8(a)(3)'s direction that the relief sought be included it the complaint.

Even if Rule 8(a)(3) does not require a plaintiff to include in a complaint a request for all the relief sought, there is still a conflict between § 768.72 and Rule 8(a)(3), because the rule clearly allows the plaintiff to include a request for punitive damages in her initial complaint, whereas § 768.72 prevents her from doing so. A state law may conflict with a Federal Rule even where it violates no affirmative command or requirement of the rule, see Hanna, 380 U.S. at 470, 85 S. Ct. at 1143, if the Federal Rule "occupies the statute's field of operation." Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 7, 107 S. Ct. 967, 970 (1987). See also United States v. Lockheed Missiles & Space Co., 171 F.3d 1208, 1217 (9th Cir. 1999); S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist., 60

F.3d 305, 307 (7th Cir. 1995); Exxon CM. v. Burglin, 4211 F.3d 948, 950 n.3 (5th Cir. 1995); Neifeld v. Steinberg, 438 F.2d 423, 426 (3d Cir. 1971). Rule 8(a)(3) occupies [§ 768.72's] field of operation," because Rule 8(a)(3) governs the ability of plaintiffs to request any and all of the relief sought (including punitive damages) in all pleadings that state a claim (including initial complaints). If applied in federal court, § 768.72 would impair the operation and effect of Rule 8(a)(3).

The nature of the conflict between § 768.72 and Rule 8(a)(3) is similar to the conflict in Hanna itself. The issue in that case was whether a Massachusetts law or Federal Rule of Civil Procedure 4(d)(1) should govern service of process. The Massachusetts law provided that service could be effected only "by delivery in hand upon [the] executor or administrator . . . ." Hanna, 380 U.S. at 462, 85 S. Ct. at 1139 (quoting Mass. Gen. Laws ch. 197, § 9 (195 8)). Rule 4(d)(1), on the other hand, provided that "[s]ervice shall be made ... [u]pon an individual ... by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. . . ." Id. at 461, 85 S. Ct. at 1138-39 (quoting Fed. R. Civ. P. 4(d)(1)) (emphasis added).

Although the express language of Rule 4(d)(1) arguably could have been viewed as not conflicting with the Massachusetts law, the Supreme Court concluded that "the clash [was] unavoidable" because "Rule 4(d)(1) says - implicitly, but with unmistakable clarity - that inhand service is not required in federal courts." Id. at 470, 85 S. Ct. at 1143. Likewise, in this case, because Rule 8(a)(3) allows a plaintiff to request in her initial complaint all the relief she seeks, it says

"implicitly, but with unmistakable clarity" that a plaintiff is not required to wait until a later stage of the litigation to include a prayer for punitive damages, nor is she required to proffer evidence or obtain leave of court before doing so. In short, Rule 8(a)(3) occupies the field in which the pleading portion of § 768.72 would otherwise operate, leaving no room for it. The two provisions do conflict.

Having concluded that Florida Statutes § 768.7 conflicts with Rule 8(a)(3), we must apply Rule 8(a)(3) unless it transgresses the Rules Enabling Act or the Constitution. See id. at 471, 85 S. Ct. at 1144. The Rules Enabling Act, 28 U.S.C. § 2072, provides, in pertinent part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right ....

It is clear that a pleading rule such as 8(a)(3) relates to the "practice and procedure" of the district courts. See, e.g., Follenfant v. Rogers, 359 F.2d 30, 31-32 (5th Cir. 1966) (matters of pleading are governed by "rules of practice" and therefore are controlled by the Federal Rules, not state law). Furthermore, in Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S. Ct. 422, 427 (1941), the Supreme Court held that as long as a Federal Rule "really regulates procedure," it will not be held

invalid on the ground that it affects substantive rights. As the Court later explained:

> Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights.

Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 445, 66 S. Ct. 242, 246 (1946).

Finally, none of the parties in this case or any other cases have challenged Rule 8(a)(3) as unconstitutional, and we see no basis for such a challenge.

III. CONCLUSION

Our application of Hanna leads us to conclude that the pleading component of § 768.72 does not apply in this case due to its conflict with Rule 8(a)(3). For that reason, we hold that the pleading requirements of Florida Statutes § 768.72 are inapplicable in federal diversity cases. It follows that Cohen's request for punitive damages should not have been dismissed for failure to comply with those requirements. Having determined that the district court erred in striking Cohen's

request for punitive damages, and that those damages may satisfy the amount-in-controversy requirement for diversity jurisdiction, we do not decide whether the other relief requested, including attorney fees and injunctive relief, would be sufficient to meet that requirement.

Accordingly, we REVERSE the district court's dismissal for lack of subject matter jurisdiction and REMAND the case for further proceedings consistent with this opinion.

APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 24, 2000

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4787THOMAS K, KAHN
D.C. Docket No. 97-3611 -Civ-JAL

CHERYL COHEN, on behalf of herself and others similarly situated,

Plaintiff - Appellant,

versus

OFFICE DEPOT, INC., a Florida corporation,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida
(February 24, 2000)

ON PETITION FOR REHEARING AND
SUGGESTION OF REHEARING EN BANC

Before BIRCH and CARNES, Circuit Judges, and MILLS*, Senior District Judge..

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*Honorable Richard Mills, Senior U.S. District Judge for Central District of Illinois, sitting by designation.

CARNES, Circuit Judge:

In our prior opinion in this case, we held that Florida Statute § 768.72 conflicts with and must yield to the "short and plain statement" rule contained in Federal Rule of Civil Procedure 8(a)(3), and as a result a Florida plaintiff in federal court because of diversity jurisdiction need not obtain leave of court before pleading a request for punitive damages. Cohen v. Office Depot Inc., 184 F.3d 1292, 1295 - 99 (11 th Cir. 1999) ("Cohen I"). We adhere to and leave that part of our earlier opinion intact.[3]

Relying on Tapscott v. MS Dealer Service Corp., 77 F.3d 1353, 1358-59 (11th Cir. 1996), we also held that "in a class action lawsuit punitive damages may be aggregated to satisfy the amount-in-controversy requirement for each class member," at least "where state law provides that an award of punitive damages is for the 'public benefit' or 'collective good,' and the award would reflect 'the wrongfulness of the defendant's course of conduct as a whole.'" Cohen I, 184 F.3d at 1295 (quoting Tapscott, 77 F.3d at 1358). Combining our two holdings, we concluded that the complaint satisfied the amount in controversy requirement because it requested $ 10,000,000 in punitive damages for the entire class of approximately 39,000 Office Depot catalogue customers. See id. at 1299.

In its petition for rehearing, Office Depot has belatedly pointed out the tension between the Tapscott decision, on

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[3] For a full recitation of the relevant facts of this case, see Cohen I, 184 F.3d at 1293-94.

which we relied in our earlier opinion in this case, and the decision in Lindsey v. Alabama Telephone Co., 576 F.2d 593 (5th Cir. 1978). Of course, pre-split or "Old Fifth" decisions such as Lindsey are binding on us, see Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981), and where two prior panel decisions conflict we are bound to follow the oldest one. See United States v. Steele, 147 F.3d 316, 1318 (11th Cir. 1998) (en banc) ("It is the firmly established rule of this circuit that each succeeding panel is bound by the holding of the first panel to address issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.") (internal quotation marks and citation omitted); United States v. Dailey, 24 F.3d 1323, 1327 (11th Cir. 1994) (where there is an intracircuit conflict of authority, "the earliest panel opinion resolving the issue in question binds this circuit until the court resolves the issue en banc") (internal quotation marks and citation omitted).

For reasons we will soon discuss, we conclude that Tapscott's holding about aggregation of punitive damages is inconsistent with the earlier holding on the same legal issue in Lindsey, and accordingly we must follow Lindsey. Doing so, we conclude that the total of $ 10,000,000 in punitive damages that was pleaded for the class of 39,000 members in this case is insufficient to satisfy the $75,000 amount in controversy requirement. This conclusion requires us to address plaintiff, class-representative Cohen's remaining arguments involving alternative theories for satisfying the amount in controversy requirement, which are that it is satisfied because of the value of the requested injunctive relief, and because of the amount of attorney fees due if the class prevails. We will discuss those issues in a later part of this opinion, but we begin with a

discussion of the inconsistency of Tapscott (and our own prior opinion following it) with Lindsey.

I. THE CONFLICT BETWEEN LINDSEY AND TAPSCOTT REGARDING AGGREGATION OF PUNITIVE DAMAGES

To avoid adding confusion to conflict, we first explain why referring to the "aggregation" of punitive damages in the context of a class action can be a bit misleading. In this case, as in Lindsey and Tapscott the punitive damages claim is a single claim on behalf of the entire class; it is not the sum total of 39,000 individual punitive damages claims. Because each class member could have sought punitive damages in individual suits, courts sometimes phrase the question as whether a class claim for punitive damages can be "aggregated" to satisfy the jurisdictional amount in controversy requirement for a class. The question, however, is not whether distinct punitive damages claims can be added together, but instead it is whether the single punitive damage claim on behalf of the class can be attributed in toto to each and every class member so they can individually satisfy the requisite amount in controversy, a requirement mandated by Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. 50 (1973).[4] If the single punitive damages claim cannot be attributed as a whole to each

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[4] Cohen argues that Zahn's holding requiring dismissal from a class suit of any plaintiff whose individual claim does not satisfy the amount in controversy requirement has been superseded by the 1990 amendments to 28 U.S.C. § 1367. As will be discussed, we need not decide that issue to resolve the present case. See infra note 13.

class member, it must be allocated or divided pro rata among the class members, and after that is done the total amount of relief sought by each plaintiff must satisfy the jurisdictional amount. With that clarification of the question, we turn to the conflicting answers of Lindsey and Tapscott.[5]

Lindsey involved a state law class action suit against two telephone companies alleged to have unlawfully extracted excessive cash deposits from the class. See Lindsey, 576 F.2d at 593. The defendants removed the case to federal court on diversity grounds. See id. at 593-94. The complaint, as construed by the Court, sought: (1) $2,000 compensatory damages for Lindsey, (2) an unspecified sum of compensatory damages for the class, which contained an unspecified number of plaintiffs, and (3) $ 1,000,000 punitive damages on behalf of the class. See id. at 595.

The Lindsey Court began its analysis by citing Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 105 3 (1969), for the broad proposition that multiple plaintiffs suing in a class may not aggregate any claims for the purpose of satisfying the amount in controversy requirement of diversity jurisdiction. Lindsey, 576 F.2d at 594. The Court then noted that each member of a class must individually satisfy the jurisdictional amount to

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[5] Although the term "aggregation" is slightly misleading in the context of punitive damages and attorneys fees, it is commonly used by courts when addressing the issue of whether the total amount of a class claim should be attributed to each member of the class. Therefore, to avoid further confusion and for the sake of consistency, we will continue to refer to the issue as one of "aggregation."

avoid being dismissed from the class suit. See id. (citing Zahn, 414 U.S.,at 300, 94 S. Ct. at 511). Because the Lindsey plaintiff had failed to plead a specific number of class members, the Court explained that it could not determine "what dollar amount represent[ed] the 'amount in controversy' for each member off the class." Id. at 595 (emphasis added). Noting that the grounds for removal jurisdiction must be found in the plaintiff's complaint itself, the Court explained that "it was not open for [the] defendants to attempt to show that the class was small enough that the claims on its behalf exceeded the sum of $10,000 per capita," id., which was the amount in controversy requirement at that time, see id. at 593.

Because it could not, tell from the complaint the number of class members, the Lindsey Court could not determine whether each member's claim satisfied the jurisdictional amount, and it therefore held that the total specified damage claim for the class - $1,002,000 - had not been shown to satisfy the amount in controversy requirement. See id. at 595. A necessary part of Lindsey's reasoning is the holding that for amount in controversy purposes a class punitive damages claim must be allocated pro rata to each class member. Otherwise, the result in that case would have been different. If the Lindsey Court had concluded that a class claim for punitive damages could be attributed in toto to each class member, i.e., considered in the aggregate, for amount in controversy purposes, the $1,000,000 punitive damages claim clearly would have sufficed, regardless of whether the number of class members in Lindsey had been two or two million. The number of class members would have been irrelevant, instead of the critical factor in the decision. Thus, Lindsey inescapably stands for the proposition that a federal court cannot exercise

diversity jurisdiction over a class action - even with completely diverse parties - solely because the total punitive damages claim on behalf of the entire class exceeds the jurisdiction amount in controversy. Instead, under Lindsey, the punitive damages claim for the class must be assigned on a pro rata basis to each class member for amount in controversy purposes. See id.

Three years after Lindsey, we split from the Fifth Circuit but retained its decisional law as our own, see Bonner, 661 F.2d at 1207, and fifteen years after the split, this Court decided Tapscott v. MS Dealer Serv. Corp. In that case, we faced another attempt to base diversity jurisdiction on a class claim for punitive damages, but we mistakenly considered the matter as one of first impression.[6] See Tapscott, 77 F.3d at 1358.. The plaintiffs in Tapscott brought a state law class action, alleging a class of over 10,000 members. See id. at 1355 n.2. The class sought statutory damages, injunctive relief, and an unspecified amount of compensatory and punitive damages, based on the defendant's allegedly fraudulent conduct in the sale of extended service contracts. See id. at 1355. The defendants removed the case to federal court on diversity jurisdiction grounds. See id. The plaintiffs contested the removal with affidavits attesting that the individual recovery

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[6] The Tapscott opinion cites Lindsey for the proposition that each member of a class must individually satisfy the amount in controversy requirement in order to avoid being dismissed from the suit. See Tapscott, 77 F.3d at 1357 n.9. But the opinion does not mention the part of Lindsey that requires a pro rata distribution of the claimed punitive damages for purposes of determining the amount in controversy.

for each plaintiff would not exceed $50,000, the amount in controversy required for diversity jurisdiction at the time. See id. The defendants responded that, for jurisdictional purposes, the class claim for punitive damages should be considered in the aggregate. See id. at 137-59. We agreed and upheld the removal of the case to federal court. See id. at 1359.

In Tapscott, this Court pointed to the Supreme Court's discussion in Snyder, which indicated that multiple plaintiffs may aggregate claims if they have "a single title or right in which they have a common d undivided interest." Id. at 1357 (quoting Snyder 394 U.S. at 335, 89 S. Ct. at 1056). We then considered the nature of punitive damages under Alabama law, finding that Alabama awards punitive damages to plaintiffs not "as a matter of right," but rather as a means to punish and deter wrongful conduct. See id. at 1358. Because punitive damages were intended to serve the collective good, we reasoned that the class had a "common and undivided interest" in the punitive damages claim. See id. at 1358-59. That is why this Court in Tapscott permitted the punitive damages claim to be used to satisfy the requisite amount in controversy for the entire class; in effect, we let the whole amount of the punitive damages claim be used by each class member for that purpose, a result inconsistent with the decision in Lindsey almost twenty years earlier. See id. at 1359.

Attempting to distinguish Tapscott from Lindsey, Cohen points to the analysis in Tapscott addressing whether the punitive damages claim constituted a "single collective right in which [the class members had] a common and undivided interest." Id. She contends that the "common and undivided interest" issue was never presented to us in Lindsey, and thus,

there is no real conflict between our Lindsey and Tapscott decisions. Cohen's contention misconstrues the operation of our prior panel precedent rule. The issue in Tapscott was the same as that in Lindsey: whether a class claim for punitive damages can be considered in the aggregate in order to establish diversity jurisdiction over all potential members of a class, or must instead be attributed pro rata to each class member.

"Common and undivided interest" is simply the standard used to decide which, if any, claims by multiple plaintiffs may be considered in the aggregate for jurisdictional purposes, and which must be divide among the class members. See Snyder, 394 U.S. at 335, 89 S. Ct. at 1056. But we had already decided in Lindsey that a class claim for punitive damages could not be considered in the aggregate for each class member, or at least that such a claim, arising under Alabama law could not be. Our conclusion to the contrary in Tapscott, which also involved Alabama punitive damages law, is inconsistent with the result in Lindsey. Because the same state law governed punitive damages in each case, there can be no difference between the two cases insofar as the "common and undivided interest" analysis is concerned.[7]

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[7] Compare Allen v. R H Oil & Gas Co., 6 3 F.3d 132 (5th Cir. 1995) (allowing aggregated class claim for punitive damages because, under Mississippi law, plaintiffs had a "common and undivided interest" in punitive damages claim), with Ard v. Transcontinental Gas Pipe Line Corp., 138 F.3d 596, 602 (5th Cir. 1998) (disallowing aggregated class claim for punitive damages in Louisiana case and stating that "[i]t is unclear to us what Mississippi law regarding punitive damages

The fact that this case involves a Florida law punitive damages claim does not distinguish it from Lindsey, because as we concluded in our prior panel opinion in this case, the nature of punitive damages is the same under Florida law as under Alabama law. See Cohen I, 184 F.3d at 1295. We explained that both states award punitive damages to serve the collective good, noting particularly that "Florida law, like Alabama law, provides that 'punitive damages are warranted only where the egregious wrongdoing of the defendant ... constitutes a public wrong.'" Id. (citation omitted). Consequently, there can be no difference between this case and Lindsey stemming from a "common and undivided interest" analysis of state punitive damages law.[8]

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drove the Allen panel to depart from Lindsey's rule, but we find no principle in Louisiana law ... that permits us to depart from Lindsey ").

[8] As we noted in our prior opinion in this case, our decision in Tapscott to consider the class punitive damages claim in the aggregate was also based the fact that "the award of punitive damages [would] reflect not the wrong done to any single individual but the wrongfulness of the conduct as a whole." See Cohen I 184 F.3d at 1295 (citing Tapscott, 77 F.3d at 1358-59)). The class in that case consisted of over 10,000 members, and the allegedly fraudulent transaction underlying each member's claim involved relatively small amounts of money. See Tapscott, 77 F.3d at 1358-59. Reasoning that "where the wrong to the individual is small but the course of conduct is large, the potential punitive damages would be to punish and deter the course of conduct as a whole," we concluded in Tapscott that it was appropriate to view the class

claim for punitive damages in the aggregate. Id. at 1359. We also suggested that if the facts indicated the punitive damages award "would be determined on an individualized consideration of the egregiousness of the harm done to individual class members," id. at 1359 n.13, instead of the "wrongfulness of the defendant's course of conduct as a whole," id. at 1358, then aggregation might not be proper. See id. atl359 n.13. In view of this analysis in Tapscott, the Lindsey decision arguably could be viewed as holding only this: when a plaintiff fails to specify the size of the class, thereby preventing the court from determining the extent of the defendant's wrongful course of conduct, the class claim for punitive damages cannot be viewed in the "aggregate," i.e., it cannot be attributed in toto to each class member.

Unfortunately, our analysis in Lindsey forecloses that potential distinction between that case and Tapscott. In Lindsey, we stated that if the plaintiff had alleged a specific number of class members, that allegation "would have permitted the court to ascertain what dollar amount represents the 'amount in controversy' for each member of the class." Lindsey 576 F.2d at 595 (emphasis added). Significantly, our analysis in Tapscott suggests that the aggregation of punitive damages is proper when the defendant's course of conduct affects a large number of individuals. See Tapscott, 77 F.3d at 1359. But according to our prior analysis in Lindsey, a "large" class is exactly what would have prevented the amount in controversy requirement from being satisfied. Our concern in Lindsey was that the number of class members, or the divisor, might be so large that the $1,000,000 punitive damages claim, when divided by the number of class members, would result in

Cohen's real argument is that the result and holding of Lindsey are wrong because we failed to apply a "common and undivided interest" analysis - she says it was not even considered. Even if we thought Lindsey wrong, the prior panel precedent rule is not dependent upon a subsequent panel's

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an amount less than $10,000 (the requisite amount in controversy at the time). We indicated in Lindsey that the class would satisfy the amount in controversy requirement if the complaint alleged a total number of members that "was small enough that the claims on its behalf exceeded the sum of $10,000 per capita" Lindsey 576 F.2d at 595 (emphasis added). Thus, while our opinion in Lindsey does not explicitly forbid the aggregation of a class claim for punitive damages, the reasoning and result in that opinion does.

Under our reasoning in Lindsey, a punitive damages claim must be divided by the total number of class members with the quotient attributable to each class member for amount in controversy purposes. See id. Our inability to determine the number of class members, or the divisor, was critical not because we could not determine the nature of the defendants' course of conduct, but because without a divisor we could not do the division necessary. We could not divide the class punitive damages claim by the number of class members without knowing that number. A Fifth Circuit panel recently acknowledged the necessary implication of our Lindsey decision. See Ard, 138 F.3d at 601 (construing Lindsey to "appl[y] Snyder's reasoning that compensatory damage claims cannot be aggregated for jurisdictional purposes to the context of punitive damage claims"); see supra at note 6.

appraisal of the initial decision's correctness. Nor is the operation of the rule dependent upon the skill of the attorneys or wisdom of the judges involved with the prior decision - upon what was argued or considered. Unless and until the holding of a prior decision is overruled by the Supreme Court or by the en bane court, that holding is the law of this Circuit regardless of what might have happened had other arguments been made to the panel that decided the issue first.

Lindsey held that, for purposes of deciding whether the amount in controversy requirement had been satisfied, the amount of an Alabama punitive damages claim was to be divided by the number of class members and the result attributed to each member of the class. Tapscott decided to the contrary. Because Lindsey predates Tapscott, we must follow Lindsey as the precedent of this Court. See Steele, 147 F.3d at 1318; Dailey, 24 F.3d at 1327.

Accordingly, we rescind that part of our prior opinion in this case that relied upon Tapscott to hold that the $10,000,000 punitive damages claim on behalf of Cohen's proposed class satisfied the amount in controversy requirement for diversity jurisdiction over this case. See Cohen I, 184 F.3d at 1294-95. The punitive damages claim does not satisfy the amount in controversy requirement, because when the $ 10,000,000 class claim for punitive damages is divided among the alleged 39,000 class members, as Lindsey requires for amount in controversy purposes, each member's share of the claim is approximately $256.

We now address Cohen's other two grounds for satisfying the requisite amount-in-controversy: (1) the value of

the requested injunctive relief, and (2) the amount of attorney fees due if the class prevails.

II. COHEN'S OTHER GROUNDS FOR DIVERSITY JURISDICTION

A. INJUNCTIVE RELIEF

In addition to requesting compensatory and punitive damages, this lawsuit seeks to enjoin Office Depot from engaging in unfair and misleading advertising regarding the catalogue prices of its products. Cohen claims that Office Depot's advertising indicates that the prices for products purchased from its catalogues are the lowest prices available anywhere, but that the truth is some products are less expensive if purchased at Office Depot stores. She argues that enjoining such allegedly misleading advertising would "result[] in changes to Office Depot's advertising and business practices, thereby benefitting the Plaintiff class, as a whole, by an amount that is clearly in excess of the jurisdictional requirement of Section 1332." Appellant's Br. 44-45.

When a plaintiff seeks injunctive or declaratory relief, the amount in controversy is the monetary value of the object of the litigation from the plaintiff's perspective. See Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc., 120 F.3d 216, 218-20 (11th Cir. 1997). In other words, the value of the requested injunctive relief is the monetary value of the benefit that would flow to the plaintiff if the injunction were granted. In this case, Cohen maintains that the class has a "common and undivided interest" in the injunctive relief, and thus, if considered in the

aggregate, the monetary value of it to the class - alone or combined with the other claims for relief - would satisfy the $75,000 amount in controversy requirement. However, we need not address whether the monetary value of the requested injunctive relief should be considered in the aggregate, or instead attributed pro rata among the class members, because we conclude that the monetary value of the injunctive relief to the class plaintiffs in this case is "too speculative and immeasurable" to establish the requisite amount in controversy in either event. See id. at 221-222.

We have little trouble concluding "to a legal certainty" that the value of the injunctive relief does not satisfy the jurisdictional amount in this case, see St. Paul Mercury Indem. Co. v. Red Cab Co.,303U.S.283, 288-89, 58 S. Ct. 586, 590 (1938), because we doubt that any monetary value at all would accrue to the class plaintiffs upon issuance of the prospective injunction. If the requested injunctive relief were granted, Office Depot would not be required to offer its products at the lowest price available, but instead could simply raise the price of the products in its stores a sufficient amount that its advertising of catalogue prices was no longer false. That result would comply with the injunction the class seeks, but it would be of no monetary benefit to them. Indeed, to the extent class members also buy products in Office Depot stores, the injunction would cost them money under that scenario.

But let us assume Office Depot's reaction to the requested injunction would be to leave product prices as they are and clarify its advertising to remove any statement that catalogue prices are the same as store prices. That result is the most the class could hope for from the requested injunction, but

it is one which would be of little or no monetary value to class members. The benefit of the injunction to the class plaintiffs would be the knowledge that some office products were less expensive when purchased at Office Depot stores than when purchased through the catalogue. However, upon class certification aid notice, the class plaintiffs would already have known that, because the allegedly misleading advertising is the very basis of the class action.

Although Cohen's complaint seeks class certification under subdivisions (b)(1)(A), (b)(1)(B), and (b)(3) of Fed. R. Civ. P. 23, Cohen's class, if certified, would likely be certified as a (b)(3) class.[9] Certification under Rule 23(b)(3) would

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[9] Because Cohen's class seeks compensatory damages, it cannot be certified as a (b)(1)(A) class. See In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987). As for potential certification under (b)(1)(B), we fail to see from the complaint's allegations how individual suits against Office Depot brought by one or more class members "would as a practical matter be dispositive of the interests of the other members ... or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B); see also 7A Charles Alan Wright & Arthur R.
Miller, Federal Practice and Procedure § 1774 (2nd ed. 1986 (explaining that "(b)(l)(B) allows class actions to be brought in cases in which separate suits might have undesirable effects on the class members"). Moreover, the possibility that an individual suit "will have either precedential or stare decisis effect on later [suits] is not sufficient" for (b)(1)(B) class certification. In re Dennis Greenman Sec. Litig., 829 F.2d at 1546.

require that the class members receive notice of the suit "well before the merits of [it] are adjudicated." See Schwarzschild v. Tse, 69 F.3d 293, 295 (9th Cir. 1995) (citations omitted); Fed. R. Civ. P. 23(c)(2); see also 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1788 (2nd ed. 1986). As a result, before any injunction were granted, the class would already know that the catalogue price of some Office Depot products is higher than the store price. Or, stated differently, if the injunction were not granted, the class plaintiffs would still know that the advertising is sometimes false and that they can avoid paying the higher catalogue prices simply by shopping elsewhere or by purchasing the products at Office Depot's stores. The injunctive relief itself would not be of any monetary value to the class members. Cf. Crawford v. American Bankers Ins. Co. of Fla., 987 F. Supp. 1408, 1415 (M.D. Ala. 1997) (explaining that the class members' "financial recovery will come ... from their tort and [restitution] claims, not from the prospective injunctive relief").

The remote possibility - if there be any - that monetary value might somehow flow to the class plaintiffs from the requested injunctive relief is "too speculative and immeasurable to satisfy the amount in controversy requirement." Ericsson, 120 F.3d at 221-222. In Ericsson, the plaintiff company, Ericsson, claimed that the City of Birmingham improperly handled the bidding process for its purchase of a communications system, resulting in the company losing the communications system contract to Motorola. See id. at 217. Ericsson sought to enjoin the city's contract with Motorola and also h4ave the court declare Ericsson the lowest responsible bidder, entitling it to the contract with the city worth almost $ 10,000,000. See id. However, the district court noted that,

under Alabama law, the only remedy available to Ericsson was to have the district court enjoin the performance of the city's contract with Motorola as void. See id. at 221. Not only did the court lack authority to declare Ericsson the lowest bidder, it could not even require the city to rebid the contract. See id.

Consequently, the only benefit to Ericsson from its injunctive relief would have been the possibility that the city might rebid the contract and that, during the rebid, the city might select Ericsson's communications system and price. See id. at 221-22. We refused to pile possibility onto possibility to estimate the value of that benefit, but instead held that "[b]ecause [Ericsson could not] reduce the speculative benefit resulting from a rebid 'to a monetary standard, [] there [was] no pecuniary amount in controversy.'" Id. at 222 (quoting Texas Acorn v. Texas Area 5 Health Sys. Agency, Inc., 559 F.2d 1019, 1023 (5th Cir. 1977)).

Similarly, the injunctive relief in this case involves too many contingencies, such as the manner in which Office Depot might alter its pricing schemes and the extent to which the class members' purchasing patterns might change. Because of these contingencies, any benefit to the class from the injunction cannot be reduced to a reasonable monetary estimate.[10] See id.

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[10] Like the plaintiff in Ericsson, Cohen has not established a monetary value for the injunctive relief claim. See id. at 222 n. 18. Cohen argues that her proposed amended complaints provide bases for valuing the injunctive relief claim, primarily the substantial expense Office Depot would incur by "retooling" its pricing scheme and advertising. The potential cost of compliance to the defendant, however, is irrelevant in

at 222. We therefore conclude that any monetary value to Cohen's class from the injunction is either non-existent, or at least too tenuous of a foundation for diversity jurisdiction. In reaching this conclusion, we also note that the policy underlying 28 U.S.C. § 1332(a), which is to reserve federal court diversity jurisdiction for disputes involving relatively substantial damages, further informs our refusal to speculate about the value of a prospective injunction to the class plaintiffs in this case. See Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1044-45 (3rd. Cir. 1993) (noting that § 1332(a) "must be narrowly construed so as not to frustrate the congressional purpose behind it"). The total compensatory and punitive damages claim for each class member in this case is

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determining the value of the benefit that would be obtained by the plaintiff from an injunction. See Ericsson, 120 F.3d at 218-20. For that reason, the proposed amended complaint did not establish the requisite amount in controversy based on the value of the injunctive relief, and accordingly, the district court did not abuse its discretion in denying leave to amend. See Halliburton & Assocs., Inc. v. Henderson, Few & Co., 774 F.2d 441, 444 (11th Cir. 1985) (noting that when "a complaint as amended is still subject to dismissal, leave to amend need not be given") (citation omitted).

about $260,[11] well below the $75,000 threshold for diversity jurisdiction.

Because the class claim for injunctive relief is too speculative to satisfy the amount in controversy requirement, we turn now to the question of whether the potential recovery of attorney fees, alone or in combination with the damages claims, can establish the jurisdictional amount in controversy.

B. ATTORNEY FEES

On behalf of the class, Cohen brought claims under Florida statutes that prohibit deceptive business practices, see Fla. Stat. § 501.201 et. seq., and misleading advertising, see Fla. Stat. § 817.41. Both statutory causes of action authorize a court to award attorney fees to the prevailing party. See Fla. Stat. § 501.2105; Fla. Stat. § 817.41. Cohen contends that when a statutory cause of action entitles a party to recover reasonable attorney fees, the amount in controversy includes consideration of the amount of those fees. She is correct. See Missouri State Life Ins. Co. v. Jones, 290 U.S. 199, 202, 54 S. Ct. 133, 134

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[11] While there are persuasive reasons for viewing the amount in controversy as the total liability faced by a defendant, instead of as the amount each plaintiff stands to gain, "the Supreme Court has long since closed that door." Davis v. Carl Cannon Chevrolet-Olds. Inc., 182 F.3d 792, 798 (11 th Cir. 1999). In this case, the approximate compensatory damages claim of each member, assuming Cohen's claim is representative of the other class members, is $3.57. Each member's share of the punitive damages claim is approximately $256. The total damages claim of each class member, therefore, is less than $260.

(1933); Premier Indus. Corp. v. Texas Indus. Fastener Co., 450 F.2d 444, 447 (5th Cir. 1971).

Cohen also contends that the attorney fees in this case will clearly surpass the $75,000 threshold for the amount in controversy; and she argues that the amount of fees she anticipates will be awarded either should be (1) attributed to her as the prevailing party, with jurisdiction over the other class plaintiffs established under 28 U.S.C. § 1367(a) (the supplemental jurisdiction provision), or (2) considered in the aggregate and attributed in toto to each member based on their "common and undivided interest" in the attorney fees. Assuming away our doubts that Cohen has established a sufficient basis for her contention that an award of attorney fees

in this case will reach $75,000 or more,[12] we address in turn her arguments as to how that amount of fees should be attributed.

First, we find no basis for attributing the potential award of attorney fees to Cohen, either individually or as the class representative. The claim for attorney fees in this case is based on two Florida statutes: Fla. Stat. § 501.2105(1), authorizing an award of attorney fees to "the prevailing party" in an action based on deceptive business practices; and Fla.

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[12] We doubt that Cohen has sufficiently established that $75,000 in attorneys fees will be recovered in this case. In her proposed amended complaint, Cohen contends that over $60,000 in reasonable attorneys fees had been incurred up to that point in the litigation and that ultimately over $100,000 in fees would be incurred. However, Cohen provided no documentation supporting those contentions or specific explanation for the substantial amount claimed. Arguably, when the amount in controversy substantially depends on a claim for attorneys fees, that claim should receive heightened scrutiny. Cf. Packard 994 F.2d at 1046 (explaining that when a "[punitive damages] claim comprises the bulk of the amount in controversy and may have been colorably asserted solely or primarily [for jurisdictional purposes], that claim should be given particularly close scrutiny"). However, because of the permissive nature of St. Paul's "legal certainty" standard for the sufficiency of a plaintiff's amount in controversy allegation, and because our decision would not be different even if the claimed amount of fees were accurate, we will assume that Cohen has alleged a sufficient basis for a potential attorneys fee award exceeding $100,000, as estimated in her proposed amended complaint.

Stat. § 811.41(6), mandating an award of attorney fees to "[a]ny person prevailing" in an action based on misleading advertising. If this class action were successful on the merits, the entire class of plaintiffs - not just Cohen - would "prevail" in the action, and accordingly, it is the class and not just Cohen who would recover attorney fees under the statutes.[13]

In addition, as an individual class member, Cohen stands to recover no more than $260 in damages. In her first proposed amended complaint, Cohen indicated that over $100,000 in reasonable attorney fees would be incurred in the litigation. Attributing to one plaintiff an anticipated attorney fees award that is over 384 times greater than that plaintiff's stake in the litigation could raise serious questions about the reasonableness of the fee award. For these reasons, we conclude the claim for attorney fees in this case is not attributable solely to Cohen, but instead to the entire class. Because of that conclusion, we must now decide how the

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[13] Cohen's citation to In re Abbot Labs., 51 F.3d 524 (5th Cir. 1995), is inapposite. The Court in that case attributed a claim for attorney fees to the class representatives, because the relevant Louisiana statute provided that a "court may allow the representative parties their reasonable expenses of litigation, including attorney[] fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class." Id. at 526 (emphasis added). Unlike the statute in Abbott, the Florida statutes at issue here do not contain language indicating that the award of attorneys fees should go to the class representatives.

claimed attorney fees should be attributed to each class member for amount in controversy purposes.[14]

Cohen maintains that the class members share a "common and undivided interest" in the anticipated award of attorney fees, and thus, the claim for those fees should be viewed in the aggregate, with the total amount attributed to each class member. Office Depot responds that, like the class claim for punitive damages, the amount of the claimed attorney fees should be divided pro rata among each individual class member. In light of a recent decision by this Circuit and the relevant Florida case law, we conclude that the claim for attorney fees is not "a single title or right in which [the class

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[14] Cohen asks us to join the Fifth and Seventh Circuits in concluding that Congress statutorily overruled Zahn's holding that each plaintiff must assert a claim satisfying the requisite amount in controversy to avoid being dismissed from a class action based on diversity jurisdiction. See Stromberg Metal Works v. Press Mechanical. Inc., 77 F.3d 928, 930-33 (7th Cir. 1996); In re Abbott Lab., 51 F.3d at 527-29. She contends that the 1990 amendments to 28 U.S.C. § 1367 authorize a court to exercise supplemental jurisdiction over the claims of the entire class, once the claim of one class member is found to satisfy the amount the controversy requirement. However, we need not address that argument. Because the claimed attorney fees in this case are not attributable solely to Cohen, no member of the class has an individual claim at satisfies the requisite amount in controversy. Therefore, diversity jurisdiction will exist in this case only if the claimed attorney fees may be considered in the aggregate, attributed as a whole to each class member.

members] have a common and undivided interest" in the claimed attorney fees. See Snyder, 394 U.S. at 335, 89 S. Ct. at 1056. Therefore, for amount in controversy purposes, the estimated total attorney fees award should be divided among all of the class members.

In Darden v. Ford Consumer Finance Co., ___F.3d ____ (11th Cir. 2000), the defendant attempted to remove a class action to federal court on diversity grounds, arguing that the class plaintiffs' claim for attorney fees under the Georgia RICO statute should be considered in the aggregate for amount in controversy purposes. We rejected that argument. Following the principles laid down by the Supreme Court in Snyder, we concluded that the claimed attorney fees did not constitute a "single title or right" in which the class members had a "common and undivided interest." See id. at *3-6. In reaching th t conclusion, we noted that each class plaintiff could have recovered his attorney fees in individual suits under the RICO statute. See id. at *5. It followed that the class members did not share a "single title or right" in the claimed attorney fees, but instead, each member had a "separate and distinct statutory right or claim to recover those attorney[] fees." Id. Noting further that under Georgia law the statutory award of attorney fees serves to compensate injured plaintiffs, we reasoned that considering the fees in the aggregate would contravene Snyder's prohibition against aggregating

compensatory damages.[15] See id. Therefore, we refused to aggregate the claimed attorney fees of the class."[16]

We construe Darden to hold that a statutory claim for attorney fees may not be considered in the aggregate for amount in controversy purposes, at least not when both of these factors are present: (1) the class members have a "separate and distinct" right to recover attorney fees under the relevant statute; and (2) state law provides that the statutory attorney

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[15] Darden distinguished the "collective good" purposes of the punitive damages in Tapscott from the compensatory nature of the attorneys fees in that case. See Darden. Therefore, the decision in Darden did not depend on the continued validity of the Tapscott decision. However, if Darden had somehow reiterated the part of Tapscott that conflicts with Lindsey, we would still be compelled to follow Lindsey to the extent of any conflict. The prior panel precedent rule precludes us from "hold[ing] that two subsequent panel opinions can implicitly overrule a prior panel opinion." Johnson v. City of Fort Lauderdale, Fla., 126 F.3d 1372,1380 n.10 (11thCir. 1997).

[16] This Court also rejected the aggregation of an attorney fees award in Davis, 182 F.3d at 796-97. However, the precedential effect of Davis on this case is minimal, because that case did not involve a statutory right to attorneys fees. Instead, Davis addressed only the "narrow question... [of] whether a fee to be deducted from a [class action] common fund may, if it exceeds $75,000, satisfy the amount-in-controversy requirement." Id. at 796.

fees serve to compensate the class members for their injuries.[17] Applying that holding to the facts of this case, we conclude that the claimed attorney fees may not be considered in the aggregate to establish the requisite amount in controversy.

As for the first factor, the class members in this case could recover their individual attorney fees incurred in separate, individual suits under Florida's consumer protection statutes. See Fla. Stat. § 501.2105(l) (authorizing fee award for "prevailing party"); Fla. Stat. § 817.41(6) (mandating fee award for "[a]ny person prevailing" under the statute). Like the Georgia RICO statute involved in Darden, the Florida statutes in this case provide "each individual plaintiff in a putative class the right to recover attorney[] fees in the case." Darden, The members of Cohen's class are not joining to "enforce a single title or right" in the statutory award of attorney fees, see Snyder, 394 US at 335, 89 S. Ct. at 1056, because each member has a "separate and distinct right" in the claimed fees. See Darden.

The second factor is also present. Like the attorney fees award under the Georgia RICO statute in Darden, an attorney fees award under Florida consumer protection statutes serves an important compensatory purpose. In BMW of North Amer., Inc. v. Krathen, 510 So. 2d 366, 368 (Fla. 4th Dist. Ct. App. 1987), the District Court of Appeals for the Fourth District noted that "the obvious purpose of the 'Little FTC Act' [which includes § 501.2105(1)] is to make consumers whole for losses

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[17] Because both factors are present in this case, we need not decide whether either one standing alone would prevent aggregation of attorney fees to satisfy the amount in controversy.

caused by fraudulent consumer practices [and that] ... [t]hese aims are not served if the attorney[] fees are not included in the protection." Id. at 368 (citation omitted); cf. Florida Erection Serc. v McDonald, 395 So. 2d 203, 207-08 (Fla. 1st Dist. Ct. App. 1981) (explaining that an award of attorney fees, unlike an award of punitive damages, "does not provide remuneration to the claimant over and above the amount necessary to compensate him for his loss"). Even though the primary purpose of such an award is to encourage private enforcement of statutory policies, thus benefitting the public, see Standard Guaranty Ins. Co. v. Quanstrom, 555 So. 2d 828, 833-34 (Fla. 1990), that does not mean attorney fees are not also compensatory in nature. The Florida Supreme Court has recognized that private individuals cannot be expected to pursue statutory causes of action unless their own losses and costs, including their attorney fees, will be fully compensated. See id. (noting that "[i]f ... consumers cannot recover in full their attorney fees, they will quickly determine it is too costly ... to file suit, and individual enforcement of this act will fail") (quoting LaFemey v. Scott Smith Oldsmobile. Inc., 410 So. 2d 534, 536 (Fla. 1st Dist. Ct. App. 1978)). Because the statutory attorney fees involved in this case serve a significant compensatory purpose, in this case as in Darden, aggregating the claimed attorneys fees would be inconsistent with Snyder. Consequently, the nature and purpose of the statutory right to attorney fees in this case strongly resemble those of the statutory right to attorneys fees in Darden, it follows that the result should be the same.

Because the attorney fees authorized by the Florida statutes in this case serve to compensate plaintiffs for losses resulting from allegedly unlawful business practices, and

because claims for those fees could be asserted by the class plaintiffs in individual suits, we conclude that the claimed fees do not constitute "a single title or right in which [the class members] have a common and undivided interest." Snyder, 394 U.S. at 335, 89 S. Ct. at 1056. It follows that the amount of claimed attorney fees may not be considered in the aggregate - may not be attributed in whole to each class member - but instead, like the class claim for punitive damages, it must be divided out among the total number of class members for amount in controversy purposes. Because each class member's damages claim approximates $260, and the claimed attorney fees must be divided pro rata among 39,000 class members, an astronomical amount of attorney fees would have to be recovered in order to satisfy the amount in controversy requirement.[18] Such a recovery is not possible, and therefore, neither is diversity jurisdiction.

III. CONCLUSION

Because we conclude that Cohen has failed to allege a sufficient amount in controversy to establish jurisdiction under 28 U.S.C. § 1332(a), we vacate our prior opinion reversing the district court's dismissal of this case and remanding for further

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[18] Each class member must, in effect, "recover" $74,740 in attorneys fees ($75,000 required for diversity jurisdiction minus the $260 in damages per class member). That means the class would have to recover a total of $2.9 billion in attorneys fees ($74,740 multiplied by the alleged 39,000 class members).

proceedings. We now affirm the district court's order dismissing the case, for lack of subject matter jurisdiction.

AFFIRMED.

APPENDIX C - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING COHEN'S PETITION FOR REHEARING AND REHEARING EN BANC ISSUED MAY 31, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-4787-HH

CORRECTED

CHERYL COHEN, on behalf of herself and others similarly situated,

Plaintiff-Appellant,

versus

OFFICE DEPOT, INC., a Florida corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, F.2d _____).

Before: BIRCH and CARNES, Circuit Judges, and MILLS*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/Ed Carnes
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

*Honorable Richard Mills, Senior U.S. District Judge for the Central District of Illinois, sitting by designation.

APPENDIX D - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT GRANTING COHEN'S MOTION TO STAY ISSUANCE OF MANDATE FILED JULY 7, 2000

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-4787-HH

CHERYL COHEN, on behalf of herself and others similarly situated,

Plaintiff-Appellant,

versus

OFFICE DEPOT, INC., a Florida corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ORDER:

( ) The motion of Appellant, Cohen, for (X) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellant, Cohen, for (X) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including

August 15, 2000, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

APPENDIX E - ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED APRIL 3, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-3611-CIV-LENARD

CHERYL COHEN, on behalf of herself and others similarly situated,

Plaintiff,

vs.

OFFICE DEPOT, INC., a Florida corporation,

Defendant.

_____/

Filed D.C.
APR 03 1998
Carlos Juenke
Clerk U.S. Dist. Ct.
S.D. OF FLA. - MIAMI

ORDER OF DISMISSAL

THIS CAUSE came before the Court upon the Defendant's Motion to Strike Plaintiff's Claims for Punitive Damages (DE16), filed February 2, 1998, Defendant's Motion to Strike Plaintiff's Unauthorized Claims for Attorney's Fees (DE17), filed February 2, 1998, Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (DE18), filed February

3, 1998, Defendant's Motion to Dismiss (DE20), filed February 3, 1998, and Defendant's Motion for Bond (DE36), filed March 11, 1998. The Court has considered the motions and the responses and replies thereto, and otherwise advised in the premises, finds as follows.

I. INTRODUCTION

On November 12, 1997, Plaintiff, Cheryl Cohen ("Cohen") filed the above-captioned action against Defendant Office Depot ("Office Depot") on behalf of herself and a proposed nationwide class of approximately 39,000 plaintiffs in order to recover actual damages incurred by virtue of allegedly deceptive advertising by Office Depot in its catalogs. Cohen also seeks a permanent injunction barring deceptive advertising by Office Depot, $10,000,000.00 in punitive damages, interest, costs and attorneys' fees. Office Depot responded to the Complaint by filing motions to dismiss Cohen's action for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. Office Depot also asks the Court to strike Cohen's requests for punitive damages and attorneys' fees as unauthorized.

II. ANALYSIS

"Federal courts are courts of limited jurisdiction." Burns v. Windsor Ins. Co., 31 F.3d1092, 1095 (11th Cir. 1994). Where as here, the complaint contains no claims based upon federal law, the plaintiff must allege facts supporting jurisdiction based upon diversity of citizenship pursuant to 28 U.S.C.A. § 1332 (West 1993 & Supp. 1998). The district court has subject matter jurisdiction pursuant to Section 1332

where the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and is between citizens of different states. Where class action allegations are pled, diversity of citizenship is present where the defendant and class representative(s) are of diverse citizenship, irrespective of the citizenship of the potential class members. See Snyder v. Harris, 394 U.S. 332, 340 (1969). In the Complaint, Cohen alleged that she and Office Depot are citizens of Georgia and Florida, respectively, and that "although Plaintiff's compensatory damages may be relatively low, Plaintiff seeks on behalf of herself and the Plaintiff class, aggregate punitive damages of at least $10,000,000.00 and attorney's fees in which Plaintiff will have an undivided interest." (Compl. ¶ 4.) In fact, Plaintiff's alleged compensatory damages amount to approximately $2.30. Id. ¶ 5. As a result, Cohen does not and cannot rely on her allegations with respect to compensatory damages to satisfy the amount in controversy requirement of Section 1332. Further, members of a class cannot aggregate their individual claims to exceed the jurisdictional minimum amount in controversy. See Zahn v International Paper Co., 414 U.S. 291, 294-302 (1973); Snyder v. Harris, 394 U.S. at 335-42.

Cohen does rely on her claims for punitive damages injunctive and declaratory relief and attorneys' fees to satisfy the amount in controversy requirement necessary to this Court's jurisdiction over her action, however. Office Depot contends that Cohen's request for punitive damages contravened Fla. Stat. Ann. § 768.72 (West Supp. 1998) and therefore must be stricken from the Complaint and also as a basis upon which Cohen may rely to for federal jurisdiction. (Def.' s Mot.

Dismiss at 4; Def.'s Mot. Strike Punitive Damages at 3-6.) Section 768.72 provides that

> [i]n any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

In Sanders v. Mayor's Jewelers, Inc., 942 F. Supp. 571 (S.D. Fla. 1996), this Court found Section 768.72 to be fully applicable in federal court. 942 F. Supp. at 575-76. In that case, the Court struck the plaintiff's claims for punitive damages for her failure to request leave to plead such claims. 942 F. Supp. at 576. The Court then instructed the plaintiff to comply with Section 768.72 by applying for leave to assert such claims should she wish to do so. Id. Like the plaintiff in Sanders, Cohen failed to seek leave before including her claim

for punitive damages in the Complaint. As a result, Cohen's punitive damages claims must be stricken.[19]

Cohen, however, asks the Court to distinguish her action from the one brought in Sanders on the ground that Sanders was before the Court under the federal question jurisdiction provision of 28 U.S.C.A. § 1331 (West 1993),

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[19] But for the requirements imposed by Section 768.72, Cohen's $10,000,000.00 punitive damages claim appears to satisfy the amount in controversy requirement. In Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353 (11th Cir. 1996), the Eleventh Circuit held that punitive damages may be aggregated in a class action where state law provides for such damages and where state law provides for the award of punitive damages for the "public benefit" or "collective good." 77 F.3d at 1358-59. In Florida, "[p]unitive damages are imposed in order to punish the defendant for extreme wrongdoing and to deter others from engaging in similar conduct." Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986) (citing Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981)). "[P]unitive damages are warranted only where the egregious wrongdoing of the defendant, although perhaps not covered by criminal law, nevertheless constitutes a public wrong." Id. (citing Arab Termite & Pest Control, Inc. v. Jenkins, 409 So. 2d 1039 (Fla. 1982)). Punitive damages are available for violations of Fla. Stat. Ann. § 817.41 (prohibiting misleading advertising) and for common law fraud, the theories upon which Counts III and IV of the Complaint are based. As a result, the aggregation of punitive damages to meet the amount in controversy requirement in this case would be proper under the reasoning of Tapscott.

rather than the diversity of citizenship jurisdiction provision of Section 1332. (Pl.'s Resp. at 11-12.) Cohen contends that should the Court fail to distinguish between the cases, the result will be to bar her entirely from pursuing her claims in federal court. Id. Cohen supports her desire to litigate her case in federal court with nothing more than the assertion that "[c]learly, a state court is not equipped to maintain a national class action such as this case, which involves over 39,000 class members [from] at least 39 states." Id. at 12. This assertion is disingenuous at best.

Cohen also has argued that her claims satisfy the amount in controversy requirement based either upon the value of the injunctive and declaratory relief or upon the attorneys' fees that she seeks. The party seeking to invoke the jurisdiction of the federal courts has the burden of proving its existence. See Majd-pour v. Georgiana Community, Hosp. , Inc., 724 F. 2d 901, 903 (11th Cir. 1984); Fountain, Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1041 (11th Cir. 1982). The Court must consider the allegations of the Complaint and the evidence submitted by Cohen to determine whether it appears to a legal certainty that her claim is for less than the $75,000.00 jurisdictional minimum and thus that the action must be dismissed. See Baltin v. Alaton Trading Corp., 128 F.3d 1466, 1472 (11th Cir. 1997). "The determination of whether the requisite amount in controversy exists is a federal question; however, 'State law is relevant to this determination insofar as it defines the nature and extent of the right plaintiff seeks to enforce.'" Duderwicz v. Sweetwater Sav. Ass'n, 595 F.2d 1008, 1012 (5th Cir. 1979) (quoting Johns-Manville Sales

Corp. v. Mitchell Enters., Inc., 417 F.2d 129, 131 (5th Cir. 1969)).[20]

In Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc., 120 F.3d 216 (11th Cir. 1997) , the Eleventh Circuit noted that where a plaintiff seeks "only declaratory and injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." 120 F.3d at 218 (quoting Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977)). In this case, that object is enforcement of the right of Cohen and the class to be free of those practices of Office Depot that violate the Florida Deceptive and Unfair Trade Practices Act, measured from the Plaintiff's perspective. Fla. Stat. Ann. 501.211(l); 120 F.3d at 21920. Motorola instructs the Court to determine whether the value of the injunctive relief to Cohen and the class is "sufficiently measurable and certain to satisfy" the $75,000.00 requirement. 120 F.3d at 221. In certain types of cases, the value of injunctive relief is "sufficiently measurable."See, e.g., Occidental Chem. Corp. v. Bullard, 995 F.2d 1046, 1047-48 (11th Cir. 1993) (equating value of declaration of rights under and specific performance of option portion of mineral rights lease with fair market value of option property). In other cases, the value of such relief is speculative. See, e.g., Motorola, 120 F.3d at 221-22 (finding value of injunctive relief which would allow plaintiff to rebid for a municipal contract too speculative). In this case, Cohen

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[20] The Eleventh Circuit has adopted as blinding decisions of the former Fifth Circuit rendered prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1081) (en banc).

did not support her assertion that "an injunction in this case would require Office Depot to refrain from engaging in unfair and deceptive representations, resulting in changes to Office Depot's advertising and business practices, thereby benefitting the Plaintiff class, as a whole, by an amount that is clearly in excess of the jurisdictional requirement of Section 1332" with a dollar value. See Pl.'s Resp. at 7; Motorola, 120 F.3d at n.18. As in Motorola, the "speculative benefit" resulting from a permanent injunction enjoining Office Depot from deceptive advertising cannot be reduced to a monetary standard, "there is no pecuniary amount in controversy" based upon Cohen and the potential class' request for declaratory and injunctive relief. Motorola, 120 F.3d at 222 (quoting Texas Acorn v. Texas Area 5 Health Sys. Agency, Inc., 559 F.2d 1019, 1023-23 (5th Cir. 1977)). Alternatively, the monetary standard to which the request for injunctive relief may be reduced for Cohen is $2.30, an amount which is not aggregable with the actual alleged losses of the potential class members for the purpose of the amount in controversy determination. See Zahn v. International Paper Co., 414 U.S. 291, 294-302 (1973); Snyder v. Harris, 394 U.S. 332, 335-42 (1969).

Cohen and the proposed class also contend that the amount in controversy requirement is satisfied by their potential entitlement to attorneys' fees on two of the seven claims brought under Sections 501.211 and 817.41, Fla. Stat. Ann. Cohen argues that "[r]ecovery of attorney fees in this action, either in an aggregate award to class members, or individually, by Cohen, as class representative, will satisfy the amount in controversy requirement because the attorney fees that will be incurred in pursuing this complex action will exceed the $75,000 amount required under Section 1332." (Pls.'

Resp. at 4.) Although attorneys' fees where authorized by the statute sued on may be calculated into the amount in controversy determination, see, e.g., Missouri State Life Ins. Co. v. Jones, 290 U.S. 199 (1933), and Graham v. Henegar, 640 F.2d 732 (5th Cir. 1981), it is unclear whether Cohen's argument with respect to the fees warranted by the complexity of this action is sufficient to meet her burden of proving that her claims are within the jurisdiction of this Court. Indeed, attorneys' fees would have to make up the vast majority of the required $75,000 minimum amount in controversy, given that Cohen claims $2.30 in compensatory damages. The Court finds that Cohen has not met her burden on this issue.

III CONCLUSION

In sum, Cohen has neither alleged nor adduced facts which show that the amount in controversy is sufficient to invoke the subject matter jurisdiction of this Court. Further, at this time, it appears to a legal certainty that the claims alleged in the Complaint, other than the claims for punitive damages stricken above, are for less than the jurisdictional minimum set forth by 28 U.S.C.A. § 1132. As a result this case must be dismissed. Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that this action is **DISMISSED** for lack of subject matter jurisdiction. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (DE18) and Defendant's Motion to Strike Plaintiff's Claims for Punitive Damages (DE16) are **GRANTED**. All other pending motions are **DENIED** as moot, and the Clerk shall close this case forthwith.

DONE AND ORDERED in Chambers at Miami, Florida, this 3 day of April, 1998.

S/

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

CC: Robert C. Maland, Esq.
Alvin D. Lodish, Esq.
Troy Ferguson, Esq.

(2)

No. 00-246

IN THE

Supreme Court of the United States

CHERYL COHEN, on behalf of herself and others similarly situated,

Petitioner,

v.

OFFICE DEPOT, INC., a Florida Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the decision of the Court of Appeals for the Eleventh Circuit in this case following *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978) under the prior panel precedent rule because it is the earliest decision in the Eleventh Circuit on the issue of whether punitive damages may be aggregated in a class action to satisfy the amount-in-controversy requirement for diversity jurisdiction, is in conflict with *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995).

Whether the Eleventh Circuit interpreted the "matter in controversy" language of Title 28, U.S.C. Section 1332 exclusively from a single plaintiff's perspective, whether Petitioner has standing to raise this issue and whether, if both of the foregoing are answered in the affirmative, such an interpretation violates some defendant(s)' constitutionally protected equal protection guarantees.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Office Depot, Inc., has no parent corporation and, other than Massachusetts Financial Services Company, no publicly held company owns 10% or more of its stock.

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TABLE OF CITED AUTHORITIES

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Gilman v. BHC Securities, Inc., 104 F.3d 1418 (2d Cir. 1997) 8

Graf v. Safeco Ins. Co. of Am., 977 F. Supp. 971 (E.D. Mo. 1997) 8

Green v. H & R Block, 981 F. Supp. 951 (D. Md. 1997) 8

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Monroe v. Cuna Mutual Insurance Society, 1999 WL 1078702 (W.D. Tenn. 1999) 9

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STATEMENT OF THE CASE

On November 12, 1997, Petitioner, Cheryl Cohen ("Petitioner" or "Cohen"), filed a class action complaint against Office Depot. R1-1.[1] Cohen claims that she purchased $28.98 worth of office supplies (a printer cartridge and file folder labels) from Office Depot's Fall 1997 catalog. R1-5:¶¶ 15-16. Thereafter, she allegedly visited a nearby Office Depot store and discovered that she could have purchased the cartridge for $2.00 less than she paid through the catalog and the file folder labels for 30¢ less. *Id.*

Office Depot, in addition to its hundreds of retail stores located in 39 states, sells its merchandise through mail-order catalogs. In order to beat its competitors' prices, Office Depot offers a "155% Low Price Guarantee" which allows customers, should they find an identical item advertised for less, to receive the lower price plus 55% of the difference toward the purchase at Office Depot. R1-1-3:¶19. Cohen does not allege that she asked Office Depot to honor this guarantee and was refused. Instead, she filed suit claiming that she was entitled to the "155% Low Price Guarantee" contained in Office Depot's catalog. She sought the difference between what she paid for the cartridge and file folder labels through the catalog and what she would have paid for those items at the Office Depot store — $2.30 — plus 55% of the difference — $1.27. R1-1-10 to 15: ¶¶ 38, 47, 52, 57, 60, 64. Her compensatory damage claim was $3.57.

Petitioner's class action complaint in federal court alleged the following causes of action: unfair and deceptive

1. Record references are to the record before the Court of Appeals for the Eleventh Circuit.

trade practices, injunctive relief, fraud, misleading advertising, unjust enrichment and negligent advertising. R1-1. Cohen claimed that the statements contained in Office Depot's mail order catalogs regarding its prices were misleading and designed to cause customers to believe that the catalog prices were as low as or lower than the prices charged by Office Depot's competitors or the prices charged by the hundreds of Office Depot stores dispersed throughout the United States. R1-2-3:¶¶ 6, 8-11. Cohen admitted in her complaint, however, that the same catalogs upon which she premised her claim also explained, under the boldfaced heading, "**About Our Prices**" that "[p]rices at individual Office Depot stores may be slightly different," that prices in the catalog "may not be indicative of the actual selling prices in [the customer's] area," and that actual savings would vary. R1-1-4:¶9(d) & attachment. She requested compensatory damages, statutory attorneys' fees, injunctive relief and punitive damages.

Cohen premised federal jurisdiction on diversity, pursuant to Title 28, U.S.C. Section 1332(a). She alleged that she was a citizen of the State of Georgia, R1-1-2:¶2, and that Office Depot was a citizen of the State of Florida. R1-1-2:¶3. She recognized, however, that her $3.57 compensatory damage claim fell far short of the $75,000 minimum amount-in-controversy required under Section 1332. She asserted that, "although Plaintiff's compensatory damages may be relatively low, Plaintiff seeks, on behalf of herself and the Plaintiff class, aggregate punitive damages of at least $10,000,000 and attorneys' fees in which Plaintiff will have an undivided interest." R1-1-2:¶4. She sought that amount on behalf of all of the 39,000 class members. R1-1-7:¶22.

Office Depot filed a series of motions demonstrating that the true amount in controversy in this action fell far short of the statutory $75,000 minimum for diversity actions. Office Depot moved to dismiss the complaint for failure to state a claim, R1-20, to strike plaintiffs' claims for punitive damages[2], R1-16, to strike various unauthorized claims for attorneys' fees, R1-17, and to dismiss for lack of subject matter jurisdiction. R1-18.

In the motion to strike punitive damages, Office Depot noted that Florida law prohibits a plaintiff from asserting a claim for punitive damages prior to court approval, and that Cohen had failed to comply with the statute. R1-17-3, 5 (citing § 768.72, Fla. Stat.). Office Depot argued that Section 768.72 applies in federal court to state-law claims for punitive damages. R1-17-4. Accordingly, in the motion to dismiss for lack of subject matter jurisdiction, Office Depot noted that Cohen could not rely on the punitive damage claim to meet the required $75,000 amount-in-controversy. R1-18.

The district court dismissed the complaint for lack of subject matter jurisdiction, noting that Cohen's compensatory claim amounted to less than $4.00. R2-54-3. The district court then held that Cohen's claim for punitive damages was

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2. Petitioner asserts that punitive damages are warranted because Office Depot admitted that its claim of free delivery was false. Petition at 3-4, n.4. Office Depot has made no such admission. Petitioner refers to a comment made by an Office Depot public relations person who was asked about a state court action, virtually identical to this federal case, that had just been filed. R3-4 and Exhibit C to Attached Cohen Affidavit. Any such statements by Office Depot's public relations personnel do not constitute corporate admissions.

unauthorized under Section 768.72 and thus was stricken. R2-54-5. Without a punitive damage claim, and because her claims for injunctive relief and attorneys' fees did not satisfy jurisdictional requirements, the district court determined that she had failed to establish the minimum amount-in-controversy as required by Title 28, U.S.C. Section 1332.

The Eleventh Circuit, in its first opinion, *Cohen v. Office Depot, Inc.*, 184 F.3d 1292 (11th Cir. 1999) ("*Cohen I*") determined that Section 768.72 conflicted with Fed. R. Civ. P. 8(a)(3) and that she did not need leave of court before pleading a request for punitive damages. Additionally, *Cohen I* determined that punitive damages could be aggregated in this case to satisfy the amount-in-controversy requirement for diversity jurisdiction. In reaching this conclusion, *Cohen I* relied upon *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir. 1996), a case applying Alabama law.

In its Petition For Panel Rehearing and Petition For Rehearing En Banc, Office Depot pointed out that the panel erred in relying upon *Tapscott*, which held that the amount-in-controversy requirement for diversity jurisdiction could be met by aggregating a class claim for punitive damages under Alabama law. However, prior to the *Tapscott* decision, the Eleventh Circuit had reached the opposite conclusion in the decision of *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978).[3] As Office Depot argued, because *Lindsey* and *Tapscott* decided the same issue under Alabama law,

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3. In 1981, the Court of Appeals for the Fifth Circuit "split" and the Eleventh Circuit was created. As a result, Fifth Circuit cases decided prior to 1981 are binding precedent on the current Fifth Circuit, as well as the Eleventh Circuit. *See Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981).

the panel was required to follow the earlier *Lindsey* decision under the prior panel precedent rule. *See United States v. Dailey*, 24 F.3d 1323, 1327 (11th Cir. 1994) ("when there is no method of reconciling an intracircuit conflict of authority, 'the earliest panel opinion resolving the issue in question binds the circuit until the court resolves the issue en banc.' ")

The Eleventh Circuit granted rehearing and issued its second opinion in *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000) ("Cohen II"). The Eleventh Circuit analyzed its prior decisions in *Lindsey* and *Tapscott* and determined that there was no difference between the two cases in so far as the "common and undivided interest" analysis was concerned. *Id.* at 1075. Applying the prior panel precedent rule, the Eleventh Circuit found that *Lindsey* was controlling and rescinded that part of its opinion in *Cohen I* that relied upon *Tapscott* to hold that the $10 million punitive damage claim on behalf of Cohen's proposed class satisfied the amount-in-controversy requirement for diversity jurisdiction. *Id.* at 1076-77. In *Cohen II*, the Eleventh Circuit specifically declined to analyze whether it thought *Lindsey*, or for that matter *Tapscott*, was correctly decided. *Id.* Instead, the Eleventh Circuit relied upon the prior panel precedent rule to reach its decision. After further analysis of other issues, *Cohen II* affirmed the district court's dismissal of the complaint for lack of subject matter jurisdiction.

Several additional points in response to Cohen's statement of the case are in order. As noted above, *Cohen II* did not address the substantive merits of either *Lindsey* or *Tapscott*. Rather, upon Office Depot's Motion for Rehearing filed after *Cohen I*, the Eleventh Circuit examined *Lindsey* to ensure that it was applicable to the facts presented in this case. After concluding that *Lindsey* should be applied, the

Eleventh Circuit correctly followed the prior panel precedent rule and held that *Lindsey*, as the earliest decision on point in the Circuit, mandated the result reached in *Cohen II*.

Petitioner also mischaracterizes the *Cohen II* decision when she states that it tacitly acknowledged a conflict with the Fifth Circuit by citing to *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). *Cohen II* does not, in any fashion, acknowledge a conflict with *Allen*. In fact, *Cohen II* indicates that *Allen* should be compared to the Fifth Circuit's later decision in *Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998), in which the *Ard* court recognized that it was bound to follow *Lindsey*'s rule and that it was unclear how the decision in *Allen* was reached.

Finally, Petitioner acknowledges that she filed a Petition for Rehearing and Rehearing En Banc after *Cohen II*. The Petition for Rehearing En Banc, which was denied, raised the same arguments found in Cohen's Petition for Writ of Certiorari. Simply put, Petitioner seeks to revisit those issues here, which the Eleventh Circuit properly declined to address en banc, or otherwise.

REASONS FOR DENYING THE WRIT

A. Certiorari Is Inappropriate To Resolve An Intracircuit Conflict

In an attempt to convince this Court that certiorari should be granted, Petitioner initially argues that there is an alleged conflict between the circuit courts of appeals on the issue of aggregation of punitive damages in the class action context to meet the amount-in-controversy requirement of Title 28,

U.S.C. Section 1332(a). In support of this contention, Petitioner erroneously asserts that (i) *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978) failed to consider this Court's holdings in *Snyder v. Harris*, 394 U.S. 332 (1969) and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S. Ct. 505 (1973); and (ii) *Cohen II*'s purported affirmance of *Lindsey* conflicts with the Fifth Circuit's decision in *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1324, 1326 (5th Cir. 1995). As discussed in Sections B and C below, both propositions are wrong.

At the heart of these arguments, however, is Petitioner's real contention — that *Lindsey* conflicts with *Tapscott* and *Allen*. That argument is equally flawed.

Lindsey was decided by the Fifth Circuit on July 12, 1978, prior to the split of the circuit. As such, any conflict between a decision rendered by the Fifth Circuit prior to the split (*Lindsey*) and any decision rendered by the Fifth Circuit (*Allen*) or the Eleventh Circuit (*Tapscott*) after the split results in an intracircuit conflict. As this Court recognized in *Davis v. United States*, 417 U.S. 333, 340, 94 S. Ct. 2298, 2302 (1974) an intracircuit conflict is generally not a sufficient basis for granting certiorari because, "decisions between different panels of the same court of appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the court of appeals itself." When faced with different decisions from different panels of a court of appeals, it is primarily the task of the court of appeals to reconcile its own internal difficulties. *Wisniewski v. United States of America*, 353 U.S. 901, 902, 77 S. Ct. 633, 634 (1957). Doubts about the respect to be accorded to a previous decision of a different panel should not be the occasion for

invoking so exceptional a jurisdiction as that of the United States Supreme Court. *Id.* In short, any alleged conflict between *Lindsey* and *Tapscott* or *Allen* is an intracircuit conflict and is not an appropriate basis to grant certiorari.

Furthermore, any purported conflict between *Lindsey* on the one hand, and *Tapscott* or *Allen* on the other, has been addressed. The law in the Eleventh Circuit is not in a state of flux or uncertainty. The decision by the Eleventh Circuit in *Cohen II* to correctly apply *Lindsey* under the prior panel precedent rule precludes the future application of *Tapscott*.[4]

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4. Indeed, *Tapscott* has been widely rejected. Two circuits, the current Fifth Circuit in *Ard*, 138 F.3d at 602, and the Second Circuit in *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1430 (2d Cir. 1997) rejected *Tapscott*. Numerous district courts have also rejected *Tapscott*. *See, e.g.*, *Bishop v. GM Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996) ("Tapscott represents an unwarranted and ill-considered extension of the doctrine of 'common and undivided interest' to highly speculative punitive damages claims"); *Lauchheimer v. Gulf Oil*, 6 F. Supp. 2d 339, 346-47 (D.N.J. 1998) (following *Tapscott* "would eviscerate the holdings of *Snyder* and *Zahn* and would run counter to the strict construction of the amount-in-controversy requirement those cases mandate"); *Peterson v. BASF Corp.*, 12 F. Supp. 2d 964, 972-73 (D. Minn. 1998) (rejecting *Tapscott*; "the reality that each class member could advance a separate punitive damages claim in a separate lawsuit, without affecting the punitive claims of other class members" distinguishes with a "bright line" such cases from those seeking an undivided interest in a *res*); *Green v. H & R Block*, 981 F. Supp. 951, 954 (D. Md. 1997) (rejecting *Tapscott*); *Graf v. Safeco Ins. Co. of Am.*, 977 F. Supp. 971, 972 (E.D. Mo. 1997) (same); *Karpowicz v. General Motors Corp.*, No. 97 C 1390, 1997 WL 156542, *2 (N.D. Ill. 1997) (same); *Haisch v. Allstate Ins. Co.*, 942 F. Supp. 1245 at 1250-51 (D. Ariz. 1996) (declining to follow *Tapscott*; class members only "brought their claims in a single suit for convenience

(Cont'd)

Likewise, the Fifth Circuit's subsequent discussion and analysis of *Allen* in *Ard v. Transcontinental Gas Pipe Line Corp.*, has confirmed the viability of *Lindsey* and the limitation of *Allen* in the Fifth Circuit. 138 F.3d at 601-02.

B. No Conflict Exists Between *Cohen II* and *Allen*

Petitioner's contention that *Cohen II* is in conflict with the Fifth Circuit's post-split decision in *Allen* is also erroneous. The first question presented in her petition is:

> Whether the decision of the Eleventh Circuit Court of Appeals in this case finding that punitive damages may not be aggregated in a **class action** to satisfy the amount in controversy required by 28 U.S.C. Section 1332, which is in conflict with the Fifth Circuit Court of Appeals' decision in *Allen v. R&H Oil & Gas Co.*, 53 F.3d 1326 (5th Cir. 1995), is in conformity with this Court's holdings in *Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053 (1969) and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S. Ct. 505 (1973) regarding the nature of common and undivided interests for aggregating damages. (Emphasis added.)

(Cont'd)
and economy"); *see also Engel v. Chevron Corporation, Inc.*, 1996 WL 1687454 (E.D. Tenn. 1996) (declining to follow *Tapscott* and *Allen*; holding that punitive damages may not be aggregated to meet the amount-in-controversy requirement); *Monroe v. Cuna Mutual Insurance Society*, 1999 WL 1078702 (W.D. Tenn. 1999) (declining to follow *Tapscott* in accord with Tennessee law on punitive damages); *In re Cardizem CD Antitrust Litigation*, 90 F. Supp. 2d 819, 833 (E.D. Mich. 1999) (declining to follow *Tapscott* in aggregating claimed statutory damages).

The issue resolved in *Allen* was whether aggregation of punitive damages was permissible under Mississippi law, in a case involving multiple plaintiffs but which was **not a class action**. *Allen*, 63 F.3d at 1329. The Fifth Circuit specifically pointed out in the beginning of the decision that the case was not a class action when it stated, "[t]he Allen plaintiffs' individual claims — **the suit is not a class action** . . . ." *Id.*[5] There can be no conflict when the issues presented in *Cohen II* and *Allen* are not identical. Where an asserted conflict in decisions arises from differences of fact, and not in application of a principle of law, certiorari is inappropriate. *Wisconsin Electric Company v. The Dunmore Company*, 282 U.S. 813, 51 S. Ct. 214 (1931).

Furthermore, Petitioner's claim that *Allen* stands for the proposition that the Fifth Circuit allows the aggregation of punitive damages for the purposes of satisfying the amount-in-controversy requirement is incorrect. Approximately three years after the Fifth Circuit decided *Allen*, a different panel of the Fifth Circuit issued its decision in *Ard v. Transcontinental Gas Pipe Line Corporation*, 138 F.3d 596 (5th Cir. 1998). The *Ard* decision noted that *Allen* was based upon the peculiar nature of punitive damages under Mississippi law. *Id.* at 602. In fact, *Ard* specifically noted that *Allen* departed from *Lindsey*, the law of the circuit, "solely" because of this peculiar nature of Mississippi law. *Ard* continued stating that *Allen* "does not purport to establish

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5. Other courts facing the same issue of whether punitive damages may be aggregated in order to satisfy the amount-in-controversy have also expressly noted that the *Allen* court was not faced with a class action controversy. *See e.g.*, *Addison v. Illinois Central R. Co.*, 967 F. Supp. 173, 176 (E.D. La. 1997) (holding punitive damages could not be aggregated to satisfy the amount of controversy).

a precedent for aggregation of punitive damage claims asserted under federal law or the law of any other state." *Id.* As a result, *Ard* held that *Lindsey* is still the law of the Fifth Circuit and refused to allow a class plaintiffs' punitive damage claim to be aggregated for purposes of determining the jurisdictional amount. *Id.* at 602.

Petitioner claims that *Ard*, while reaching a different result, is consistent with *Allen* and correctly advised this Court that the *Ard* decision was based upon the law regarding punitive damages in the State of Louisiana. Petition at 14. While Petitioner correctly points out that the two cases were decided under the laws of different states, this emphasizes all the more that no conflict exists between *Lindsey* and *Allen*.[6] Furthermore, the court in *Cohen II* expressly noted that the nature of punitive damages is the same under Florida law as under Alabama law, which was applied in *Lindsey*. *Cohen II*, 204 F.3d at 1075 (citing *Cohen I*, 184 F.3d at 1295). Since the nature of the state law applied in *Lindsey* is the same as in *Cohen II*, and because the Fifth Circuit determined that the state law applied in *Allen* is peculiar, *Allen* does not conflict with *Cohen II* or *Lindsey*.

Lastly, it is important to remember that the Petition for Writ of Certiorari pertains to *Cohen II*, not *Lindsey*. Petitioner's argument that "*Lindsey* failed to consider this Court's holdings in *Snyder* and *Zahn*" is not only incorrect, but of no value to this Court's decision on whether to grant certiorari. The *Lindsey* decision constitutes the law of the circuit. *Cohen II* followed *Lindsey*, without separate substantive analysis, applying the prior panel precedent rule.

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6. The Eleventh Circuit agreed with this interpretation of *Ard* in *Cohen II*. *Cohen II*, 204 F.3d at 1075. (footnote 5).

The argument that *Cohen II* is flawed because of an alleged error in the 23 year old *Lindsey* decision is absurd.[7]

C. *Lindsey* Properly Followed *Snyder* and *Zahn*

While the analysis conducted in *Lindsey* bears no relation to this Court's decision on whether to grant certiorari, Petitioner's claim that *Lindsey* did not address the holdings or analysis of *Snyder* or *Zahn* that aggregation is permissible to meet the amount-in-controversy requirement where "two or more plaintiffs unite to enforce a single title or right in which they have a common or undivided interest" is wrong. The *Ard* court expressly stated that "*Lindsey* therefore applies *Snyder*'s reasoning that compensatory damages claims cannot be aggregated for jurisdictional purposes to the context of punitive damages claims." *Ard*, 138 F.3d at 601. Furthermore, the *Lindsey* decision cites directly to *Snyder* for the proposition that, "the claims of several plaintiffs, suing as members of a class, cannot be aggregated for the purpose of satisfying this jurisdictional predicate. *See Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969);" *Lindsey*, 576 F.2d at 593. The court in *Lindsey* then included a quote, verbatim, from *Zahn*,

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7. After *Cohen II* was issued, Petitioner moved for Panel Rehearing and Rehearing (or Hearing) En Banc. This request was denied by the Eleventh Circuit on June 5, 2000. Should the Eleventh Circuit have determined that its analysis in *Lindsey* failed to properly examine *Snyder* or *Zahn*, it had the opportunity to consider this matter en banc. It appropriately determined no rehearing was necessary. It is the responsibility of a court of appeals, not the Supreme Court, to reconcile its internal difficulties. *Wisniewski v. United States of America*, 353 U.S. 901, 77 S. Ct. 663, 634 (1957).

> [m]oreover, as the Supreme Court held in *Zahn v. International Paper Co.*, 511 (1973): "The rule plainly mandates not only that there may be no aggregation (of claims) and that the entire case must be dismissed where none of the plaintiffs claim more than $10,000 but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims."

Lindsey, 576 F.2d at 593 (quoting *Zahn*, 414 U.S. 291, 94 S. Ct. 505 (citation omitted)). While perhaps the Petitioner did not like the parts of *Snyder* and/or *Zahn* properly cited by the court in *Lindsey*, it simply cannot be said that the *Lindsey* court did not address the holdings or analysis of *Snyder* or *Zahn*.

Finally, in analyzing *Lindsey* to determine whether it was required to follow *Lindsey* under the prior panel precedent rule, *Cohen II* concluded that *Lindsey* considered these aspects of *Snyder* and *Zahn* as well. *Cohen II*, 204 F.3d at 1073-75.

D. *Cohen II* Is Not In Conflict With *Free v. Abbott Laboratories*

Plaintiff also claims that the holding in *Lindsey*, and its alleged affirmance by *Cohen II*, is in conflict with the Fifth Circuit's decision in *Free v. Abbott Laboratories, Inc.*, 51 F.3d 524 (5th Cir. 1995), *aff'd*, 120 S. Ct. 1578 (2000). In support of this argument, Petitioner claims that the grant of certiorari and this Court's per curiam affirmance of *Free*, clearly affects the viability of the *Lindsey* opinion to the extent that *Lindsey* cited to *Zahn* on the issue of

non-aggregation. Petition at 21. This Court's per curiam decision in *Free* was rendered by an evenly divided court merely ending the process of direct review, settling no issue of law, and carrying no precedential weight. *Neil v. Biggers*, 409 U.S. 188, 192, 93 S. Ct. 375, 378 (1972) (declining to give any weight to Court's equally divided affirmance of lower court decision). Petitioner's blanket assertion without any authority to the contrary is clearly incorrect.

Furthermore, the issue in *Free* was whether in a class action brought under the antitrust laws of the State of Louisiana, the individual claims of the class representatives met the requisite jurisdictional amount and whether the court could exercise supplemental jurisdiction over the class members. *Free*, 51 F.3d at 527. The Fifth Circuit in *Free* held that Title 28, U.S.C. Section 1367, which grants district courts supplemental jurisdiction over related claims, overruled *Zahn* to the extent that a district court can exercise this supplemental jurisdiction even when other class members do not meet the amount-in-controversy requirements. *Id.* at 529. What the *Free* decision did not hold nor affect in any manner is whether punitive damages can qualify in determining whether the amount- in-controversy is met. In fact, the Fifth Circuit expressly noted that the *Free* decision has no bearing on the analysis regarding the aggregation of punitive damages for jurisdictional purposes in the *Ard* opinion. The court stated,

> although it is not important for our analysis, this Circuit has recognized that Zahn's holding that each plaintiff must independently satisfy the jurisdictional amount has been overruled due to congressional amendment of 28 U.S.C. 1367.

> *See In Re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995). **Neither this holding nor the premise which underlies it affects our analysis in this case.**

Ard, 138 F.3d at 600 (emphasis added). Therefore, Petitioner's assertion that the holding in *Free* impacts the analysis in this case or that it provides a conflict upon which this Court should grant certiorari is misplaced.

E. *Cohen II* Is Not An Affirmance Of *Lindsey*

Petitioner incorrectly claims that *Cohen II* constitutes an affirmance of *Lindsey*. Petition at 20. *Cohen II* is not an affirmance of *Lindsey* or its analysis. Rather, the panel in *Cohen II* clearly stated that it reversed *Cohen I* as it dealt with the aggregation of punitive damages for jurisdictional purposes on the grounds that the earliest panel opinion resolving the issue in question binds the circuit until the court resolves the issue en banc. *Cohen II*, 204 F.3d at 1072. In fact, Petitioner does not dispute that *Cohen II* properly concluded that it was bound by the earliest circuit precedent on point.[8]

Cohen II did not review the substantive basis of the *Lindsey* decision. Rather, the court compared *Lindsey* and *Tapscott* in order to support its conclusion that the same issue was presented in both cases and concluded that *Cohen I*'s reliance on *Tapscott* could not stand. Specifically, the court noted, "[Cohen] contends that the 'common and undivided interest' issue was never presented to us in *Lindsey*, and thus,

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8. It is important to note that the "Questions Presented" section of the Petition does not include any reference to the prior panel precedent rule applied in *Cohen II*.

there is no real conflict between our *Lindsey* and *Tapscott* decisions." *Id.* at 1075. The Court continued,

> Cohen's contention misconstrues the operation of our prior panel precedent rule. The *issue* in *Tapscott* was the same as that in *Lindsey*: whether a class claim for punitive damages can be considered in the aggregate in order to establish diversity jurisdiction over all potential members of a class, or must instead be attributed *pro rata* to each class member.

Id. The *Cohen II* decision clearly did not address the substantive rationale upon which *Lindsey* was based. Rather, its determination to follow *Lindsey* was based upon the prior panel precedent rule. *Cohen II* is not an affirmance of *Lindsey*.

F. Equal Protection Guarantees Have Not Been Implicated

In a final attempt to interest this Court in certiorari, Petitioner argues that Title 28, U.S.C. § 1332(a), as applied in *Cohen II*, violates a defendant's equal protection rights. Specifically, Petitioner asserts that "the *Lindsey* and *Cohen II* opinions have determined that the phrase 'matter in controversy' must be interpreted exclusively from the perspective of a single plaintiff." Petition at 22. Such a perspective, Petitioner argues, "deprives a foreign **defendant** of the statutorily created right of access to a federal court when faced with very large monetary judgments," (Petition at 21 emphasis added), and "discriminates against out of state **defendants** by preventing access to a federal forum." Petition at 24 (emphasis added).

Petitioner has never raised an equal protection argument prior to this Petition for Writ of Certiorari.[9] The argument that she raises now is vague, undeveloped and fatally flawed for three reasons. First, Petitioner has no standing to assert the equal protection rights of defendants that she alleges have been violated by *Cohen II*'s application of Section 1332. She has no injury. She is not the defendant in this matter. Second, *Cohen II* did not apply different standards to plaintiffs and defendants. Third, even if *Cohen II* had decided to treat plaintiffs and defendants differently, a rational basis exists for such treatment. Each is discussed below.

First, in order to establish Article III standing, a party "must demonstrate 'injury in fact' — a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.' *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717 (1990)." *Vermont Agency of Natural Resources v. U.S.*, __ U.S. __, 120 S. Ct. 1858, 1861 (2000). Petitioner has asserted no concrete, actual or imminent harm to herself. The alleged injured parties are defendants in class actions who seek to meet the amount-in-controversy required for federal jurisdiction by aggregating claims for punitive damages. No such defendants are before the Court. The actual defendant in this case, Office Depot, has asserted no violation of any equal protection rights.

Any indirect injury to Petitioner resulting from the alleged denial of equal protection to defendants is also insufficient to confer standing on her.

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9. Several amici raised the equal protection issue in an Amicus Brief To The Eleventh Circuit Supporting Cohen's Petition For Rehearing En Banc.

> [E]ven when "the very same allegedly illegal act that affects the litigant also affects a third party," a plaintiff "cannot rest his claim to relief on the legal rights or interests of [the] third part[y]." *U.S. v Department of Labor v. Triplett*, 494 U.S. 715, 720 110 S. Ct. 1428, 1431, 108 L. Ed. 2d 701 (1990) (internal quotation marks omitted). A party raising a constitutional challenge to a statute must demonstrate not only "that the alleged unconstitutional feature [of the statute] injures him" but also that "he is within the class of persons with respect to whom the act is unconstitutional." *Heald v. District of Columbia*, 259 U.S. 114, 123, 42 S. Ct. 434, 435, 66 L. Ed. 852 (1922). This requirement arises from the understanding that the third-party rightholder may not, in fact, wish to assert the claim in question. . . .

Miller v. Albright, 523 U.S. 420, 446, 118 S. Ct. 1428, 1442 (1998) (O'Connor, J., concurring in the judgment, joined by Kennedy, J.). This case illustrates the need for such a rule. The purported rightholder here, Office Depot, does not have, much less want, to assert this constitutional claim.

Second, *Cohen II* did not adopt the position that only the plaintiff's perspective on punitive damages may be considered. *Cohen II* applied a uniform standard, equally applicable to plaintiffs and defendants. Petitioner does not refer to any language or analysis in *Cohen II* where the court purportedly made an alleged erroneous determination that the economic impact of the case on defendant must be disregarded. No such determination was made.

Petitioner is equally vague about how *Cohen II*'s application of 28 U.S.C § 1332 might violate a defendants' equal protection rights. A single defendant will always pay more than several class plaintiffs will collect. But, *Cohen II* does not rest on the amount that individual plaintiffs collect nor the amount that a defendant pays. It rests on the Court's previous decision in *Lindsey* which determined that punitive damages cannot be aggregated. For equal protection purposes, it does not matter whether the analysis is approached from the plaintiffs' or defendant's perspective. The same standard and the same analysis were used in determining whether a plaintiff or a defendant meets 28 U.S.C. §1332(a)'s amount-in-controversy requirement. Neither may aggregate punitive damages.

Third, if the Eleventh Circuit had applied Title 28, U.S.C. § 1332(a) in a way that discriminates against defendants, which it did not, that application would not violate defendants' equal protection rights.[10] Legislatures are afforded great deference and their decisions are valid unless they bear no rational relationship to a permissible government objective. *See Parham v. Hughes*, 441 U.S. 347, 351, 99 S. Ct. 1742, 1745 (1979). If *Cohen II*'s treatment of damages does discriminate between plaintiffs and defendant, it is rational to do so.

The common law is an adversarial system in which the plaintiff sets the stage for litigation. Plaintiffs have much more control over the forum in which a case will be heard than do defendants. Plaintiffs fashion the complaint. They allege the amount of damages and other relief sought.

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10. Because 28 U.S.C. § 1332(a) is a federal statute, the Fifth Amendment would be applicable.

They also determine whether or not they will proceed as a member of a class action or individually. Likewise Plaintiffs and defendants are treated differently in many respects. The most obvious of these is the different burdens of proof and presumptions that each bear. Petitioner points to no authority that challenges this differential treatment on equal protection grounds. Indeed, *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S. Ct. 2434 (1977) does not address any equal protection issues. It was an action for an injunction brought by a Washington state group challenging a North Carolina statute. It viewed the damages from the perspective of some **individual plaintiff members** of that group. Those plaintiffs individually had damages in excess the federal jurisdiction amount.

In sum, if this Court were to determine that Section 1332(a), as applied by *Cohen II*, discriminates against defendants, such an application has as its rational basis the proper and efficient determination of whether jurisdiction exists in our adversarial system.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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In The Supreme Court of the United States

CHERYL COHEN, on behalf of herself and others similarly situated,

Petitioner,

v.

OFFICE DEPOT, INC., a Florida Corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF PURSUANT TO RULE 15

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Petitioner, Cheryl Cohen ("Cohen") files this Reply Brief, pursuant to Rule 15 of the United States Supreme Court Rules.

STATEMENT OF THE CASE

Office Depot's statement of the case seeks to minimize the lawsuit filed by Cohen by ignoring and mischaracterizing the allegations of Cohen's Complaint. Office Depot focuses attention on the "155% Low Price Guarantee," which allows a customer to receive an item advertised for less elsewhere for the advertised lower price, plus 55% of the difference. Response Brief at 1. Office Depot asserts that Cohen filed a lawsuit claiming the 155% guarantee instead of requesting it from Office Depot. This ignores the fact that the Complaint contains at least eight (8) false or misleading statements in Office Depot's catalogs, which formed the basis for Cohen's seven (7) claims in the Complaint, of which the155% guarantee claim was only one, i.e., Count V.[1] R1-1.

Office Depot's approach in picking out one of the misrepresentations and defending it does not address the claims in the Complaint. In fact, it is well settled law that in making a determination regarding unfair and deceptive acts that mislead consumers, a Court looks to the overall impression conveyed by the advertisement, and not the impact of isolated words and phrases. See Murray Space Shoe Corp. v. F.T.C., 304 F.2d 270 (2d Cir. 1962); Beneficial Corp. v. F.T.C., 542 F.2d 611 (3d Cir. 1976); American Home Products Corp. v.

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[1] In particular, Office Depot fails to address Cohen's allegations regarding unlawful and hidden charges for delivery, although catalogs tell consumers that deliveries of merchandise are free. Such hidden charges are in direct violation of Federal Trade Commission regulations. See, 16 CFR, Section 251.1.

F.T.C., 695 F.2d 681 (3d Cir. 1982); F.T.C. v. Pharmtec Research, Inc., 576 F. Supp. 294 (D.C. Cir. 1983).

In addition, Office Depot suggests, without support, that Cohen's request for punitive damages, which were provided for under Florida law, was improperly made as it rested on comments from an Office Depot spokesperson who did not make "corporate admissions." Response Brief at 3. This argument fails to address the fact that Cohen's request for punitive damages rested only in part on the spokesperson's comments to The Miami Herald. Moreover, neither the District Court nor the Eleventh Circuit Court of Appeals in its two published opinions have questioned the basis for Cohen's request for punitive damages. In fact, as the district court stated, "But for the requirements imposed by Section 768.72, Cohen's $10,000,000 punitive damages claim appears to satisfy the amount in controversy ... In Florida punitive damages are imposed ... to punish the defendant for extreme wrongdoing and to deter others from ... similar conduct." (App. E, 55a).[2]

Finally, Office Depot's Statement of the Case contains new issues that require a response. Office Depot's contention that Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000) ("Cohen II") did not address the substantive merits of Lindsey v. Alabama Telephone Co., 576 F.2d 593 (5th Cir. 1978) or Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11th Cir. 1996) and only stands for the proposition that the prior precedent rule must be followed is wrong, as discussed below.

In fact, Cohen II necessarily did more than assert the prior panel precedent rule, it changed the law of the Eleventh

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[2] References to "App." are to the Appendix filed as part of Cohen's Petition for Writ of Certiorari.

Circuit, which had been established since 1996 on the issue of aggregation of punitive damages. Moreover, Office Depot's characterization of Cohen II as not establishing the law in the Eleventh Circuit on the issue of aggregation is not supported by the Eleventh Circuit's own recent citation to Cohen II.

In Morrison v. Allstate Indemnity Co., 2000 WL 1392456 (11th Cir. Sept. 26, 2000) the Court, without citing to Lindsey, asserted that Cohen II stood for the proposition that punitive damages must be divided equally among class members. Thus, the Eleventh Circuit appears to be in disagreement with Office Depot's position regarding the meaning and effect of the Cohen II decision.

In addition, Office Depot's continual reference to Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995) as not being in conflict with Cohen II because it was decided within the same circuit as Lindsey and Cohen II simply is wrong, as discussed below, based on a review of the opinions.

REASONS FOR GRANTING THE WRIT

A. The Conflict Between Allen and Cohen II Is Not Intra Circuit and Even Assuming It Were, Certiorari Is Proper

Office Depot argues at length that certiorari would be improper because any conflict between Allen and Cohen II is intra circuit not inter circuit, as Lindsey was the controlling precedent for both decisions. Response Brief at 6-7; 11.

Quite simply, this position fails to consider the clear language of Allen, which held that whether punitive damages claims represented a common and undivided interest "[i]s a question of first impression on the appellate level in this circuit." Allen, 63 F.3d at 1332. The Allen Court so

determined even though it was aware of Lindsey and cited to it in a footnote. Id. at 1331. Nevertheless, the Allen Court determined that Lindsey was not binding on it and decided that punitive damages could be aggregated based on a review of the state law at issue, i.e., Mississippi. Thus, according to Allen, Lindsey was not implicated in or precedent for the decision whether punitive damages could be aggregated as a common and undivided interest under existing Supreme Court precedent, notwithstanding Office Depot's assertions to the contrary.[3]

In contrast, the Cohen II Court determined that Lindsey was precedent on the issue of aggregation of punitive damages and, on this basis, changed the law in the Eleventh Circuit. Tapscott. Such a ruling created a conflict with Allen, which had not previously existed. It is important to keep in mind that Tapscott also cited to Lindsey and, like the Allen Court, determined that the issue of aggregation under a common and undivided interest analysis was one of first impression in the Eleventh Circuit. 77 F.3d at 1357.

Therefore, while Office Depot seeks to create an intra circuit conflict by arguing that Lindsey governed the decisions in Allen and Cohen II, it is clear that the Allen Court's opinion does not support this argument and that, as a result, the Cohen II decision, which established that "the amount of punitive

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[3] Office Depot cites to Ard v. Transcontinental Gas Pipe Line Corp., 138 F.3d 596 (5th Cir. 1998) as a subsequent Fifth Circuit decision that "confirmed" the viability of Lindsey and the limitation of Allen in the Fifth Circuit. While Ard did cite to Lindsey as prior law on aggregation, it involved a different panel than Allen, and failed to acknowledge that Allen did not view Lindsey as precedent. Moreover, Ard did not limit Allen, but noted under Louisiana law, it did not reach the same conclusion regarding aggregation. 138 F.3d at 601.

damages must be divided equally among all of the class members ..." Morrison, 2000 WL 1392456 * 7, resulted in an inter-circuit conflict for which certiorari review is proper.

Even assuming that Lindsey was binding precedent for Allen and Cohen II, contrary to the Allen Court's conclusion, any resulting intra circuit conflict does not preclude certiorari review. Accordingly, in Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 70 S. Ct. 322 (1950) this Court granted certiorari based on an intra circuit conflict in the Second Circuit regarding the finality of a judgment for purposes of appeal. Importantly, in Saenz v. Roe, 526 U.S. 489, 119 S. Ct. 1518 (1999), while acknowledging that the decision of the Court of Appeals was consistent with other federal courts that had addressed the issue before it, this Court granted certiorari because of the importance of the issues in the case.

B. There is a Conflict Between Cohen II and Allen

Office Depot asserts that because Allen did not deal with a class action claim, but, instead involved 512 plaintiffs seeking punitive damages, it is factually distinguishable from Cohen II and no conflict between the two decisions exists. Such a contention results from a failure to properly review the arguments contained in Cohen's Petition and failure to review the language of the two opinions.

The first question presented in Cohen's petition concerned whether Cohen II's finding that punitive damages may not be aggregated in a class action was in conflict with Allen and not in conformance with Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053 (1969) and Zahn v. Int'l Paper Co., 414 U.S. 291, 94 S. Ct. 505 (1973). Office Depot focuses only on the words "class action" because Allen was not a class action case. However, this argument misses the point that the issue

presented for review in the Petition does not rest upon the "class action" status of Allen.

In fact, Office Depot fails to address the fact that the issue for this Court's review rests on the analysis of the legal principles of common and undivided interests for aggregation of punitive damages and whether plaintiffs united in a lawsuit who claim such damages may aggregate them for jurisdictional purposes. Because Cohen II and Allen reached entirely different determinations on this issue, which determinations may not be in conformity with Snyder and Zahn, they are in clear conflict. Office Depot's citation to Wisconsin Electric Co. v. The Dunmore Co., 282 U.S. 813, 51 S. Ct. 214 (1931), a one sentence per curiam dismissal of certiorari, for the proposition that certiorari is not proper when a conflict in decisions arises from facts and not principles of law, is misplaced and unavailing. It is only by an improper reading of Cohen's issue presented for review that Office Depot maintains that the conflict between Cohen II and Allen is factual and not legal.

Moreover, Office Depot's alternative assertion that Ard resolved any purported conflict between Cohen II and Allen in the Fifth Circuit Court of Appeals is unpersuasive. As noted above, the Court in Ard found that Lindsey was precedent as to its determination regarding aggregation of punitive damages. Ard, 138 F.3d at 600. However, the Ard Court failed to acknowledge that Allen specifically determined Lindsey was not precedent and decided the issue of aggregation of punitive damages based on a common and undivided interest analysis as an issue of first impression. Allen, 63 F. 3d at 1331.

Further, Office Depot's contention that Allen, Cohen II and Lindsey are all in agreement in applying state law and thus, are not in conflict on the issue of aggregation, is confusing and misplaced. Simply stated, Lindsey did not analyze the issue of

common and undivided interests under state law for aggregating punitive damages, but summarily held against aggregation. 576 F.2d at 595.[4] Allen analyzed the issue of common and undivided interests under state law and held in favor of aggregation. 63 F.3d at 1332. Cohen II effectively reversed the law of the Eleventh Circuit, which was established by Tapscott, and which was consistent with Allen on the issue of aggregation. Where's the consistency?

C. Cohen II is an Affirmance of Lindsey and Establishes the Law of the Eleventh Circuit

Equally confusing is Office Depot's assertion that Cohen II is not an affirmance of Lindsey. Office Depot argues that Cohen II only concluded that it was bound by the earliest

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[4]Office Depot's argument that Lindsey properly followed Snyder and Zahn again is based on an improper reading of the decision. Office Depot asserts that because Lindsey quoted from Zahn on the general proposition regarding non-aggregation, that this meant that the Court did, in fact, follow Snyder and Zahn. However, this argument fails to acknowledge that Lindsey did nothing more than cite to these two cases, without analysis. In fact, the Cohen II court in affirming Lindsey and reversing Tapscott had to read a great deal into the Lindsey decision. For example, the Cohen II court stated, "a necessary part of Lindsey's reasoning is the holding that for amount in controversy purposes a class punitive damages claim must be allocated pro rata ..." 204 F.3d at 1073. Similarly, the Cohen II Court noted, "Thus, Lindsey inescapably stands for the proposition that a federal court cannot exercise diversity jurisdiction over a class ..." Id. at 1075. Likewise, the Cohen II Court stated, "Thus, while our opinion in Lindsey does not explicitly forbid the aggregation of a class claim for punitive damages ..." Id. at 1075.

circuit decision and did not substantively review Lindsey or the issue of aggregation. However, Office Depot fails to address, at all, the fact that Cohen II reversed the law of the Eleventh Circuit since 1996 on the issue of aggregation of punitive damages. Moreover, contrary to Office Depot's position, the Eleventh Circuit in Morrison, cited to Cohen II as establishing that

> "[I]nstead of being aggregated ... the amount of punitive damages must be divided equally among all of the class members to determine the proper amount in controversy for each member.

2000 WL 1392456 * 7 (citation omitted). Accordingly, it is clear that Cohen II created a conflict with the Fifth Circuit's decision in Allen, which conflict did not exist prior to the Cohen II decision.

D. The Fifth Circuit's Free Decision Is in Conflict With Zahn

Office Depot maintains that the Free v. Abbott Laboratories, Inc., 51 F.3d 524 (5th Cir. 1995), aff'd 120 S. Ct. 1578 (2000) decision is not in conflict with Zahn because this Court affirmed Free in a per curiam decision. Cohen did not assert that this Court's affirmance of Free was precedent. Rather, the fact is that the law in the Fifth Circuit on the issue of supplemental jurisdiction and the viability of Zahn is uncertain and in conflict with Cohen II's determination that Zahn provides the basis for non-aggregation and for requiring plaintiffs to each satisfy jurisdictional requirements.

E. Cohen May Raise Equal Protection Arguments

Office Depot contends that Cohen's equal protection argument may not be brought before this Court for lack of

standing and because there is a rational basis for Cohen II's application of Section 1332.

First, Cohen's constitutional challenge is properly raised. As this Court noted in Pennel v. City of San Jose, 485 U.S. 1, 6, 108 S. Ct. 849, 854 (1988) "application of the constitutional standing requirement [is not] a mechanical exercise ... a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," which is the case here. Thus, notwithstanding Cohen's argument on behalf of defendants' equal protection guarantees, as affected by the application of Cohen II, Cohen, herself, has been directly injured.

Further, Cohen's arguments regarding equal protection go to the consistent theme of her arguments on appeal regarding Cohen II and the impropriety of disallowing aggregation of punitive damages to satisfy the amount in controversy requirement. Further, there was no basis for Cohen to raise an equal protection challenge until after the Cohen II decision, since prior to that time, Tapscott was the law of the Eleventh Circuit on the issue of aggregation of damages and evaluated punitive damage claims on the basis of a common and undivided interest, not from the viewpoint of one plaintiff.

Moreover, the Amicus Brief filed in support of Cohen's Petition for Rehearing raised equal protection arguments. Thus, the equal protection arguments were, in fact, brought before the Court, but were not resolved based on the denial of the petition for rehearing. Even assuming the argument had not been raised, in Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 377, 115 S. Ct. 961, 964 (1995) this Court noted that it was not until after it granted certiorari that Appellant first "[e]xplicitly presented – in his brief on the merits – the alternative arguments [that Amtrak was a federal entity."] This Court

determined that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." Id. See also Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468 (1980) (Court is not precluded from deciding issues not presented below if issue is squarely presented, is fully briefed and is important); Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 111 S. Ct. 2749 (1990) (It suffices that the court below passed on the issue presented, particularly where the issue is in a state of evolving definition and is one of importance to the administration of federal law).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Cohen's Petition, this Court should grant the Petition for Writ of Certiorari.

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